TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 360

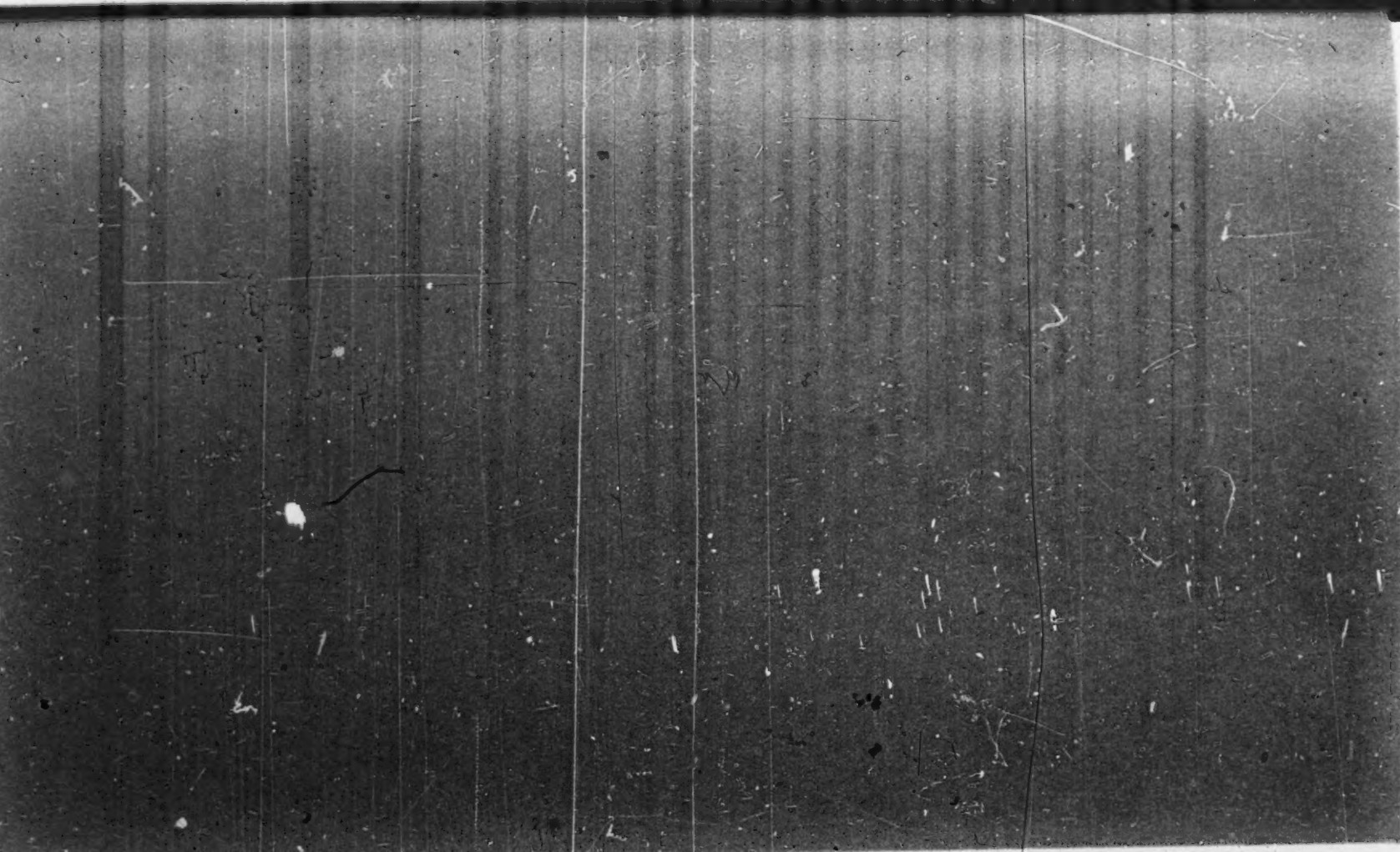
UNITED STEELWORKERS OF AMERICA,
PETITIONER,

vs.

AMERICAN MANUFACTURING COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 28, 1959
CERTIORARI GRANTED NOVEMBER 9, 1959



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INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., FEBRUARY 5, 1960

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 13,666

UNITED STEELWORKERS OF AMERICA, an Unincorporated Association, Appellant,

vs.

AMERICAN MANUFACTURING COMPANY, a Corporation, Appellee.

On Appeal from the United States District Court, Eastern District of Tennessee, Southern Division

Appendix to Appellant's Brief—Filed September 5, 1958

[fol. 2]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION
Civil Action No. 3147

UNITED STEELWORKERS OF AMERICA, an Unincorporated Association, Plaintiff,

vs.

AMERICAN MANUFACTURING COMPANY, a Corporation, Defendant.

COMPLAINT—Filed December 19, 1957

I.

Plaintiff, a labor union, is an unincorporated association whose duly authorized agents are engaged in representing, in the Eastern District of Tennessee, members who are and have been employees of defendant in an industry affecting commerce within the meaning of the Labor Management Relations Act of 1947. Defendant is a corporation doing business in and having a principal place of business in Chattanooga, Hamilton County, Tennessee, within this District. Defendant has annually purchased large amounts of raw materials from and shipped large amounts of finished products to points outside the State of Tennessee. This is [fol. 3] a suit based upon violation of and seeking performance of a contract between a labor organization representing employees in an industry affecting interstate commerce as defined in said Act, as more fully hereinafter appears, and arises under said Act regulating commerce (29 U. S. C. 185; 28 U. S. C. 1337).

II.

On or about December 1, 1956, defendant executed a contract with plaintiff in writing. This contract covered and was executed by plaintiff as collective bargaining representative for and agent of certain employees of defendant at its Chattanooga, Tennessee, plant, including employee James Sparks. A copy of said contract is attached hereto as Exhibit "A."

III.

In accordance with the provision of said contract, a grievance was filed upon behalf of employee James Sparks covered by that contract, and a copy of said grievance is attached hereto as Exhibit "B." Said grievance was not adjusted under the provisions of Article IV of said contract. Plaintiff duly gave timely notice in accordance with said Article IV thereby submitting said grievance to arbitration. Defendant has failed and refused to confer and endeavor to agree upon the selection of a Board of Arbitration, and now refuses to submit this grievance to arbitration as required by said Article IV.

By the above described omissions and breaches of contract on the part of defendant, the employee to whom said grievance applies and who is represented by the plaintiff as his statutory sole collective bargaining agent and in this suit, and plaintiff, have not received the benefits of this collective bargaining contract, all to their substantial and irreparable injury.

[fol. 4]

IV.

Plaintiff and the employee whom it represents are without adequate remedy at law and will suffer immediate continuing and irreparable injury, loss and damage unless defendant is ordered specifically to perform the above contract, and in particular Article IV thereof, and is restrained from continuing to refuse to carry out its obligations thereunder.

V.

Plaintiff in behalf of itself and the employee whom it represents has requested defendant to perform its obligations under said Article IV but defendant has refused and failed to so perform as alleged above.

VI.

Plaintiff submits to jurisdiction of this Court and offers to do equity.

Wherefore, plaintiff demands:

1. That its right and the right of the employee whom it represents under Article IV of the collective bargaining contract with respect to arbitration of said grievance be determined, and that its incidental damages and the incidental damages of the employee represented by it as a result of defendant's violations of the terms of said contract, be fixed.

2. That defendant specifically be required to perform Article IV of said contract particularly with respect to said unresolved grievance which is Exhibit B hereto.

3. That defendant be restrained from in any manner failing or refusing to perform its obligations under said Article IV and particularly with respect to said grievance.

[fol. 5] 4. Incidental damages in the sum of Twenty-five Thousand Dollars ($25,000.00) as the amount of damages sustained by plaintiff and the employee whom plaintiff represents.

5. That defendant be temporarily restrained and enjoined by the injunction of this Court and in the form prayed above, and that upon appropriate determination of this cause said injunction be made final.

6. That plaintiff may have such other and further relief as by this Honorable Court may be deemed just and equitable in the premises, all at defendant's cost.

7. That appropriate process may issue commanding defendant to answer this Bill of Complaint and to abide by

such decree as this Honorable Court may make in the premises.

Van Derveer & Parks, James Building, Chattanooga, Tennessee;

Arthur J. Goldberg, General Counsel, United Steelworkers of America, 1001 Connecticut Avenue, N. W., Washington 6, D. C.;

David E. Feller, Associate General Counsel, United Steelworkers of America;

Cooper, Mitch & Black, 1329 Brown-Marx Building, Birmingham, Alabama,

Attorneys for Plaintiff.

[fol. 6]

EXHIBIT A TO COMPLAINT

Articles of Agreement.

This agreement dated this 1st day of December, 1956, made and entered into by and between the American Manufacturing Company, of Chattanooga, Tennessee, hereinafter for convenience sometimes designated interchangeably as the "Employer", the "Company" or the "Management", and the United Steelworkers of America, hereinafter referred to as the "Union", representing the bargaining unit hereinafter defined.

Witnesseth:

It is the object of the parties hereto to establish and maintain fair and equitable hours, wages and working conditions and other conditions of employment, and to observe and promote harmonious relations; neither party will exercise its powers, rights or functions oppressively in dealing with the other. That for and in consideration of the mutual covenants, conditions and agreements hereinafter specifically set forth, the Company and the Union have agreed and do by these presents agree as follows:

Recognition: Article I.

The Company recognizes the union as the sole and exclusive collective bargaining agency with respect to wages, hours, working conditions and other conditions of employment for and on behalf of all employees in the bargaining unit as defined by National Labor Relations Board except as to confidential employees of the employer at its Chattanooga, Tennessee, plant, but excluding office and clerical employees, professional and technical employees, guards, watchmen and all other employees and superyisors as defined in the Act.

[fol. 7] Management: Article II.

The Management of the works, the direction of the working force, plant layout and routine of work, including the right to hire, suspend, transfer, discharge or otherwise discipline any employee for cause, such cause being: infraction of company rules, inefficiency, insubordination, contagious disease harmful to others, and any other ground or reason that would tend to reduce or impair the efficiency of plant operation; and to lay off employees because of lack of work, is reserved to the Company, provided it does not conflict with this agreement. The Company shall exercise its sole discretion in the selection of supervisory employees.

Any new rules which the Company may make can be questioned by the Union within ten (10) days, and may be made the subject of a grievance if felt to be unreasonable.

If any discharged or disciplined employee contends that he was not guilty of the cause given, he may question his discharge or disciplining by filing written protest within three (3) working days from the date of his discharge or disciplining. Unless such written protest is filed, all question of the discharge or disciplining will be considered waived. Back pay for loss of time and/or wages may be allowed in part or in whole should it be determined that the complaining employee has been unjustly discharged or suspended. Should the parties fail to agree the arbitration clause may be invoked.

Committee: Article III.

The Union shall certify in writing to the Company the names of its Committeemen, who shall be active employees of the Company. Members of the plant grievance committee shall be paid for time spent in grievance meetings up to two hours per month for each committee member, the [fol. 8] total number of members not exceeding four. In the event of grievances mutually agreed upon as being critical, a meeting may be held at any time without loss of pay to the committee.

Grievance Procedure and Arbitration: Article IV.

If any employee or employees shall have any grievance as to the meaning, application, operation of any provision of the agreement, the same shall be promptly submitted by such employee, with or without his committeeman, to the Foreman of the Department in which the grievance arises. In the event such grievances are not settled between the employee, with or without his committeeman and the Foreman within forty-eight (48) hours, such grievances shall then be submitted on a regular grievance form to the Plant Superintendent or his designated representative, through the Plant Grievance Committee. In the event an adjustment is not reached within five (5) work days after grievance has been presented, grievance shall be submitted to the District Representative of the Union who shall immediately make an investigation of any matter referred to him, and should the grievance have merit, he and the Grievance Committee shall meet with the Plant Management in an effort to settle the Grievance. In the event that the District Representative of the Union and the Grievance Committee and Plant Management cannot reach a satisfactory agreement on the complaint within seven (7) work days, the same shall be submitted to arbitration for a decision as hereinafter provided, and such decision shall be final and binding on both parties.

Any disputes, misunderstandings, differences or grievances arising between the parties as to the meaning, interpretation and application of the provisions of this agreement, which are not adjusted as herein provided,

[fol. 9] may be submitted to the Board of Arbitration for decision. The Board of Arbitration shall consist of one arbitrator selected by the Union and one arbitrator selected by the Company, within five (5) work days after written notice to either party that the other desires to arbitrate the dispute. The two (2) arbitrators so selected shall appoint the third arbitrator within ten (10) days after notification of arbitration has been served by either party upon the other. If the two arbitrators cannot agree upon the third person as arbitrator within the specified time above, the American Arbitration Association shall be called upon to submit five (5) names as the impartial arbitrator. The Company shall strike two names, the Union shall strike two, the remaining or fifth name shall be the arbitrator and the Chairman of the Board of Arbitration. The Board of Arbitration shall hold hearings and render its decision in writing as expeditiously as possible.

The arbitrator may interpret this agreement and apply it to the particular case under consideration but shall, however, have no authority to add to, subtract from, or modify the terms of the agreement. Disputes relating to discharges or such matters as might involve a loss of pay for employees may carry an award of back pay in whole or in part as may be determined by the Board of Arbitration.

The decision of the Board of Arbitration shall be final and conclusively binding upon both parties, and the parties agree to observe and abide by same. A majority decision of the Board of Arbitration shall be the decision of the Board of Arbitration. The Union shall pay the expenses of their arbitrator, the Company shall pay the expenses of their arbitrator and the Union and Company shall equally pay the expenses of the third arbitrator.

[fol. 10] Reporting Pay: Article V.

Any employee reporting for regularly scheduled work or permitted to come to work without having been properly notified that there will be no work, shall receive a minimum of four (4) hours pay at the regular hourly rate, except in case of labor disputes, Acts of God, or other conditions beyond the control of the Management. An employee shall be considered to have been "properly noti-

fied" that there will be no work if informed not to report by mail, telegraph, in person, or by telephone, or if anyone is told that there will be no work at the phone number given by the employee as the number where he will receive messages from the Company. A notice that is posted on the bulletin board during the work hours of the preceding day shall also constitute such notification.

Any employee who after leaving the plant and being called back to work after his regularly scheduled shift shall receiye a minimum of four (4) hours at the established overtime rate.

Hours of Work: Article VI.

Eight consecutive hours work on a shift shall constitute a work day. The work week, shall begin on the day designated for beginning the individual employee's designated shift, and five consecutive days work on the employees designated shift shall constitute a work week, provided the employee has worked at least forty hours during the week. Time worked in excess of eight hours in any one day and in excess of forty hours during the week, shall be paid for at the rate of time and one-half. Work on the seventh day of any one week shall be paid at the rate of double time. Employees shall not be entitled to both daily and weekly overtime, but to whichever amount is the greater. Double time shall be paid for all hours worked in excess of sixteen (16) consecutive hours.

[fol. 11] Leave of Absence: Article VII.

Upon application in writing of any employee for leave of absence, if granted by the Company, such leave of absence shall not interrupt continuity of service. Permission for leave of absence, if granted, shall be in writing to such employee and a copy shall be sent to Local Union.

Safety and Health: Article VIII.

The Company shall at all times operate the plant in accordance with the Laws of the state of Tennessee and it shall be kept up to the standard customary in this community in so far as heat, ventilation, sanitation, safety

equipment, lockers, washrooms, shower baths, toilets, drinking water and other such similar facilities and conveniences are concerned.

It is agreed that the Company will furnish to employees, free of charge, rubber boots, rubber aprons, rubber gloves, protective cream, goggles, respirators, and other safety equipment when necessary for the employees in the operation of the plant.

It is understood by both parties that to achieve the objective of the elimination of accidents and health hazards that it is necessary that employees use the protective devices and safety appliances which are furnished them.

It is agreed that the Company may assess a fair charge to cover willful destruction by the employee of safety equipment issued to him. Worn or used items of safety equipment shall be turned in by the employee in order to receive new equipment.

Supervisors: Article IX.

It is hereby agreed that supervisors not covered by the Contract shall not perform work customarily performed [fol. 12] by the employees covered by this agreement. However, they may do special emergency or temporary work but not to the extent that such work would replace men in the bargaining unit.

Discrimination: Article X.

The Employer agrees that there shall be no discrimination of any kind against any employee, by reason of his or her membership in the Union, or on account of Union activities. The Union agrees that there shall be no Union activities on Company time except that necessary in connection with the handling of grievances as set out in this agreement. The Union, its officers and members shall not intimidate, or coerce employees into joining the Union.

Military Clause: Article XI.

The Company will conform with the provisions of the Selective Service Act in applying re-employment and other rights to employees affected by the Act.

Rate Establishment & Adjustment: Article XII.

Time values will be set by the Company on the basis of the average time of an average workman working at average speed under normal conditions, with reasonable allowances for fatigue, personal needs, and other factors recognized in sound time study methods.

The Company shall administer the incentive rate so that extra effort will be rewarded by increased earnings, and failure to do so may be made a grievance.

When a rate is issued as permanent, it will not be changed, unless there is a change in product, methods of production, materials, tools, equipment, engineering, elements of operations, or unless an error is found.

[fol. 13]

Bulletin Boards: Article XIII.

The Company agrees to permit the Union the use of Bulletin Boards for posting notices of Union meetings, Union activities and social affairs of the Union, after said notices are approved by the Plant Superintendent or Management.

Seniority: Article XIV.

All new employees shall be considered on a temporary or probationary basis for the first sixty (60) days of their employment. If retained after that period an employee is to be considered as a qualified regular employee and shall have seniority status as of the date of employment.

The Company and the Union fully recognize the principle of seniority as a factor in the selection of employees for promotion, transfer, lay-off, re-employment, and filling of vacancies, where ability and efficiency are equal. It is the policy of the Company to promote employees on that basis.

A lay off for periods of three (3) days or less will be considered temporary and may be made on the basis of departmental seniority and previous experience on the job. For the purposes of a lay off exceeding three (3) days, plant-wide seniority shall govern, when ability and efficiency are equal.

A seniority list shall be posted on the bulletin board within fifteen (15) days after the signing of this agreement, as determined by Company records. Unless an objection is filed within ten (10) days after posting, any such list shall become final and binding upon the Company, the Union and the employees.

In the event an employee has been laid off the Company shall notify that employee by mail, at his last known [fol. 14] address, when an opening is available. If the employee fails to report for duty within five (5) days he shall be considered as having left the employ of the Company, and seniority accrued during previous employment periods shall be forfeited. It shall be the duty of such employee to inform the Company, in writing, of any change of address.

An employee who has laid off of his own accord and has accepted employment elsewhere is agreed to be no longer an employee of the Company.

When an employee is off due to illness he shall notify the Company as soon as possible and shall confirm by mail not later than three (3) days from the beginning of absence from work.

Continued illness shall be reported once each week by mail, and the Company may require medical proof of illness.

Failure to report illness in accordance with above described procedure can be considered as a voluntary quit.

The Company will furnish forms for reporting by mail at no cost to the employee.

Holidays: Article XV.

The following days shall be recognized as holidays: Fourth of July, Labor Day, Thanksgiving Day, and Christmas Day, and New Years Day. All work done on such days, shall be paid for at the rate of double time, but shall not receive additional holiday pay. Emergency work, other than regular production work, caused by conditions beyond Company control, done on holidays shall be paid for at the rate of time and one-half, but shall not receive additional holiday pay.

[fol. 15] In addition—

The day before Christmas will be observed as a paid holiday in 1957 and 1958. Good Friday will be observed as a paid holiday in 1959.

Qualified employees will be paid eight (8) hours straight time pay for each of the hereinafter listed holidays, provided the employee meets the following eligibility requirements:

1. The employee must have a record of six (6) months continuous employment with the Company, before the holiday.

2. The employee must work all time made available to him in both the work day before and the work day after the holiday. An exception is made if the employee is unable to work because he is sick, in which case he shall furnish satisfactory certification from a medical doctor as to his illness.

An employee off from work on a written leave of absence prior to two weeks before the holiday shall not be entitled to holiday pay. An employee on suspension shall not be entitled to holiday pay.

When any of the above holidays fall on Sunday, the following day, or the day observed by the state will be observed as the holiday.

Pensions: Article XVI.

The pension plan now in effect with the Provident Life & Accident Insurance Company shall continue.

Insurance: Article XVII.

The group insurance plan now in effect shall continue.

[fol. 16]

No Strikes: Article XVIII.

The Company and the Union agree that during the term of this contract there shall be no strike, lockout, slowdown or any other interference with production unless one of the parties hereto refuses to abide by the decision of the Board of Arbitrators.

The Company agrees that it will not hold the Union liable for any unauthorized or unsanctioned strike.

Any employee participating in an unauthorized work stoppage, strike or slowdown shall be subject to discharge or other disciplinary action.

Wages: Article XIX.

Rates of pay are set forth in schedule "A" which is hereby made a part of this agreement.

The effective date of all increases will be as of December 6, 1956. (See Page 9)

An additional 5¢ per hour shall be effective on the following job classification:

1. Sample Maker Class A Job No. 72A.
2. Product Repair & Salvage Man Job No. 73.

The effective date of the above additional increase shall be as of December 6, 1956, and reflects a 40¢ per hour increase over present top rates in both of these job classes.

Vacation: Article XX.

All employees who have a record of one-half (½) year's continuous employment as of July 1, or sooner, whichever date is designated by the Company, and who have worked 800 straight time hours or more in the previous six (6) months period, shall be granted one-half (½) weeks vaca- [fol. 17] tion with pay during the period of July 1, 1957-58-59 to August 31, 1957-58-59. All employees who have a record of one year's continuous employment as of July 1, or sooner, whichever date is designated by the Company, and have worked 1600 straight time hours or more in the previous twelve (12) months period, shall be granted one week's vacation with pay during the period of July 1, 1957-58-59 to August 31, 1957-58-59. All employees who have a record of five (5) years continuous employment as of July 1, or sooner, whichever date is designated by the Company, and who have worked 1600 straight time hours or more in the previous twelve (12) months period, shall be granted two weeks vacation with pay during the period of July 1, 1957-58-59 to August 31, 1957-58-59. Continu-

ous employment shall be determined from the seniority roster.

In addition to the above provision any employee not qualifying for the above named vacation benefits shall be eligible for vacation pay as hereafter described.

1. Employees with 5 years or more seniority determine number of vacation hours due by multiplying hours worked during vacation qualifying dates by .04 (vacation hour factor).

2. Employees with from 1 to 5 years seniority determine as shown by using vacation hour factor of .02.

3. Employees with over 6 months but less than 1 year's seniority shall determine as above by using vacation hour factor of .01.

The pay for such vacation shall consist of not more than forty (40) hours per week, at the minimum basic hourly straight time rate for the individual employee concerned.

Employees entitled to ½ or 1 week's pay will receive checks at the time vacation begins, those receiving 2 [fol. 18] weeks' pay will have their second week's check mailed to them by the end of the first week they are off.

Employees who voluntarily quit or are discharged for "cause" as defined in Section II of this agreement before earning his vacation shall have no claim to vacation rights.

It is agreed that should an employee terminate his employment voluntarily or otherwise after earning but before taking his vacation, then this vacation pay shall be due and payable to such employee.

The Company will when possible and practical, grant vacations at times most desirable to employees, however, the Company reserves the exclusive right to allot the date of the vacation period and in emergencies may require necessary employees to accept in lieu of their vacation their pay for such vacation.

Check-Off: Article XXI.

The Company agrees upon the ratification of this agreement and subject to all provisions hereafter set forth, that

it will make deductions from the pay of each of its employees who join or who have joined the Union, and who voluntarily execute a deduction authorization card, for such initiation fees and current dues as may be levied by the Union within the provisions of the International Constitution, and continue such deductions month by month, for the duration of this agreement.

The Company agrees that on receipt of the voluntarily executed deduction authorization cards, it will make deductions for dues from the first pay period of each calendar month following receipt of the cards, provided that notice is given to the Company not later than the twentieth of the month preceding. Past due deductions not to exceed [fol. 19] current dues shall be made on the first pay period of the month following.

There shall be a fifteen (15) day period beginning with the expiration date of this contract or a year from the effective date of the contract whichever occurs sooner, during which employees may revoke the authorization for check off. Notice requesting such revocation shall be in writing to both the Company and the Union within the fifteen day period described above.

Sums collected by the Company as deductions under the check-off authorization shall be paid to the International Secretary-Treasurer of the Union. The Union agrees to save the Company harmless from any action growing out of these deductions and commenced by any employee against the Company, and assumes full responsibility for the disposition of the funds so deducted once they have been turned over to the International Secretary-Treasurer of the Union.

Contract Termination: Article XXII.

This contract shall remain in effect for a period of three years from the date of December 1, 1956, and shall automatically continue in effect thereafter unless either party gives notice to the other of its desire to modify or revise the Contract—such notice to be given at least 60 days prior to the termination date. Notice shall be given by registered mail to United Steel Workers of America, 1500

Commonwealth Bldg., Pittsburgh 22, Pa., with a copy to United Steel Workers of America, 611 Palmetto Street, Chattanooga 3, Tennessee. Notice to the Company shall be mailed to American Manufacturing Company, 124 Chestnut Street, Chattanooga 2, Tennessee, registered mail.

[fol. 20] Smoking Period: Article XXIII.

The smoking period as presently observed limits each employee to a maximum of three (3) minutes on the smoking bench, and failure to observe the three (3) minute limitation shall be subject to disciplinary action as provided by the Company rules and regulations.

In testimony whereof the parties hereto have executed this agreement the year and day first above written.

AMERICAN MANUFACTURING COMPANY,

By .....

.....

.....

UNITED STEEL WORKERS OF AMERICA,

By .....

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NEGOTIATING COMMITTEE: LOCAL No. 4928,

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Errata from page 6, Article XIX:

An additional 5¢ per hour shall be effective on both male and female employees of 6 months seniority as of December 6, 1957.

An additional 5¢ per hour shall be effective on both male & female employees of 6 months seniority as of December 6, 1958.

[fol. 21] SCHEDULE "A"—WAGES.

It is agreed that the following base rates shall prevail in accordance with the contract.

BASE RATES.

		Start	End of Two Months	End of Six Months
I	Male Employees	1.00	1.05	1.21
II	Female Employees	.90	.95	1.11

JOB RATES.

Labor Grade	Job Description	Job No.	Start	End of Two Months	End of Six Months
A	Stock Handler—F	3	.90	.95	1.11
B	Stock Handler—M	6	1.00	1.05	1.21
	Packer—F	9	.90	.95	1.11
C	Builder—F	12	.90	.95	1.11
	Fireman—Janitor—M	15	1.00	1.05	1.21
	Bench Assembler—F	18	.90	.95	1.11
	Punch Press Operator—F	21	.90	.95	1.11
D	Parkerizing Operator—M	24	1.00	1.05	1.21
	Kick Press Operator—F	27	.91	.96½	1.12
	Machine Operator—M	30	1.00	1.05	1.21
E	Plating Operator—F	33	.97	1.01½	1.18
	Order Filler—Boxer—M	36	1.00	1.05	1.21
E	Easel Machine Operator—M	37	1.00	1.05	1.21

Labor Grade	Job Description	Job No.	Start	End of Two Months	End of Six Months
C	Centrifugal Machine Operator—M	42	1.00	1.05	1.21
	Tumbler Operator—M	45	1.00	1.05	1.21
	Frame Bending Mach. Oper.—M	48	1.00	1.05	1.21
	Plating Operator—M	33 M	1.00	1.05	1.21
F	Bit Twister Operator—M	54	1.00	1.05½	1.22
	Press Setter Operator—M	57	1.00	1.05½	1.22
G	Frame Welding Mach. Oper.—M	60	1.05	1.10½	1.28
	Forging Mach. Oper.—M	63	1.05	1.10½	1.28
	Spot Welding Mach. Oper.—M	66	1.05	1.10½	1.28
	Ring Welding Mach. Oper.—M	69	1.05	1.10½	1.28
	Sample Maker—M	72	1.05	1.10½	1.28
[fol. 22]					
	Process Supervisor—M	75	1.05	1.10½	1.28
	Wire Straightener and Cut Off Mach. Oper.—M	78	1.05	1.10½	1.28
	Press Welder Operator—M	81	1.05	1.10½	1.28
	Wreath Machine Operator—M	81	1.05	1.10½	1.28
	Plating Operator Senior—M	33 S	1.05	1.10½	1.28
	Paint Sprayer	42 S	1.05	1.10½	1.28
H	Automatic Wire Forming Mach. Oper.—M	87	1.10	1.16½	1.39
	Sample Maker, Class A—M	72 A	1.10	1.16½	1.39
	Product Repair and Salvage Man—M	73	1.10	1.16½	1.39

Shift Premium.

There shall be a shift differential paid in addition to base rates of four (4) cents an hour for the second shift and six (6) cents an hour for the third shift.

EXHIBIT B TO COMPLAINT

Grievance Report.

USA Local Union No. 4928.

Location Chattanooga, Tennessee.

Name: James Sparks. Union Ledger No. ..... Age 25.

Address: 14 Trowhitt St., Chattanooga, Tennessee.

Department: Plating. Operation: ..... Check No. ....

Service: From November 9, 1955 through March 26, 1957.

Nature of Grievance: James Sparks and the Union, Local 4928, United Steelworkers of America, feel the Company is in violation of Article XIV, (Seniority) of present agree-
[fol. 23] ment by not allowing James Sparks to return to work at his regular job after being released by his doctor—(Dr. Kimsey) who has released him, saying—"he is able to return to his former job."

The Union demands the Company return James Sparks to his regular job and pay him for all time lost since his release on September 16, 1957.

(Date filed, September 23, 1957.)

[fol. 25]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TENNESSEE

SOUTHERN DIVISION

Civil Action No. 3147

UNITED STEELWORKERS OF AMERICA,

vs.

AMERICAN MANUFACTURING COMPANY.

ANSWER—Filed January 23, 1958

The defendant, American Manufacturing Company, for answer to the complaint filed against it in this cause, says:

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

The Court is without jurisdiction to determine the matters alleged to be in dispute.

Third Defense

The plaintiff is estopped from maintaining this action, or claiming that there is a grievance as alleged because of the action and final judgment of the Circuit Court of Hamilton County, Tennessee, in Workmen's Compensation Cause No. 7898, in the suit of James D. Sparks vs. American Manufacturing Company and Employers Mutual Liability Insurance Company of Wisconsin. In that suit the same James D. Sparks, for whose use and benefit the action before this Court has been brought, obtained an award of Workmen's Compensation benefits based on a permanent-partial disability of twenty-five (25%) percent. In that [fol. 26] case a judgment was awarded the said James D. Sparks for his disability in the sum of Three Thousand Six Dollars and Twenty-four Cents ($3,006.24) in addition to the costs of the cause, and in addition to Baroness Erlanger Hospital bill of One Hundred Twenty-eight Dollars Eighty Cents ($128.80) and the bill of Dr. Warren H. Kimsey in the sum of Four Hundred Thirteen ($413.00) Dollars). A certified copy of the entire record in the said proceedings in the Circuit Court of Hamilton County, Tennessee, is attached hereto and made a part hereof as Collective Exhibit "A" to this Answer.

As a further basis for this defense of estoppel, defendant shows that the plaintiff has heretofore claimed to have sustained an injury by accident in February of 1956; and that he has further claimed that in the course of his employment, he suffered another accident on March 29, 1957, aggravating the earlier injury, while "doing or performing essentially the same type of work," namely, "lifting a heavy frame from a rack about waist high over his head," and that "in order to do so was required to get in an awk-

ward or strained position." This is shown by the original petition, and by the order amending the original petition as found in the aforesaid Exhibit "A" to this Answer.

And defendant now shows that the said James D. Sparks represented, or caused to be represented to the Circuit Court of Hamilton County, Tennessee, on September 9, 1957, that by reason of said condition he had become disabled to the extent of fifty-five (55%) or sixty (60%) percent before surgery, and that on September 9, 1957 (after the surgery), he had a partial-permanent disability which would remain at about twenty-five (25%) percent. In this connection there was submitted the report of his attending physician and surgeon, Dr. Warren Kimsey, dated August 14, 1957, in the following words and figures:

[fol. 27] "Progress Notes.

Mr. James Sparks Age: 24 Ref: Joe VanDerveer
1400 Trewhitt Street
Chattanooga, Tennessee

Date: 14 August 1957

This patient returned today for re-examination. He states that the pain in his right leg has disappeared. He still has pain and stiffness in his lower back region and also he has some muscle spasm in the lumbar spine when he walks around or exerts himself.

Repeat examination revealed that there was mild muscle spasm in the lumbar muscles and forward flexion was still limitation of lumbar spine motion. This limitation was not as great as it was before operation. Examination of the lower extremities revealed that deep reflexes were plus 2, active and equal, and there was no hypalesia on sensory examination.

This patent is a laborer and he is a heavy and obese male. I believe he will have permanent disability as far as his lumbar spine is concerned by reason of having had a herniated disc which necessitated surgery. I believe his disability was 55 or 60 per cent before surgery and I believe it is approximately 25 per cent at the present time. I also believe that his partial permanent disability will remain at about 25 per cent.

WARREN KIMSEY, M. D."

Fourth Defense

Defendant admits that it executed the contract, a copy of which plaintiff has filed as Exhibit "A" to the complaint.

However, defendant denies that this matter is one for arbitration as plaintiff claims; and defendant denies that [fol. 28] plaintiff has properly presented any valid or arbitrable grievance, or that either the plaintiff or James Sparks has followed the prescribed and customary procedures, as plaintiff claims.

Defendant respectfully shows that James D. Sparks, for whose use and benefit this suit was filed, suffered a permanent-partial disability on the basis of which he sought, and on September 9, 1957, obtained an award of Workmen's Compensation Benefits. The alleged "Grievance Report" (Exhibit "B" to the complaint) bears date two weeks later. The contract under which plaintiff seeks to have this Court to act, in Article II reserves to the defendant, there designated as "The Management of the works," the direction of the working force the right to hire, and the right to suspend or discharge any employee for "any ground or reason that would tend to reduce or impair the efficiency of plant operation."

The said James D. Sparks, through his personal physician and surgeon, informed defendant that said Sparks has a twenty-five (25%) percent permanent disability and that he "cannot lift over thirty (30) pounds of weight."

The nature of defendant's business is such that the work necessarily and customarily done by James D. Sparks and the men of the plaintiff's association, involves the lifting of large frames, and of heavy racks or groups of frames, and requires able bodied action in bending over at the waist to deposit these in open tanks or vats containing solutions, some hot, some acid and some of other chemicals. It further necessitates the lifting and removal of the said frames or groups of frames out of said waist high tanks or vats, and the frequent repetition of this process. In this work it is impossible for the employee to avoid positions which at times will be awkward or strained. Also, a part of the work at times involves the handling and the pushing

of loaded bins or trucks up and over ramps connecting [fol. 29] different levels of the plant. On the finding of his own physician, and on the finding of other physicians whose reports were furnished the defendant, the said James D. Sparks, was not, and never will be, able to do the lifting, stooping and bending and type of work he necessarily would be required to do in defendant's plant. As is shown by his amended complaint in the Tennessee Court, he has heretofore had a ruptured intervertebral disc, which he averred was aggravated by the necessary physical activity of his work. As has been hereinbefore shown, he underwent surgery and has permanent disability. It is a fact of which the Court can well take judicial knowledge that a back condition, such as James D. Sparks is shown to have, would predispose him to further recurrence or aggravation should he pursue the type of work done in defendant's plant. The employment of this man would not only impair the efficiency of the plant operation in his own inability to do the necessary work, but also would be an impairment of the efficiency of the plant in the hazard that would be entailed to James D. Sparks himself and to other employees, by reason of the dangers incident to his working with and in proximity to other workers in this type of work; and by reason of the danger to himself and others of the possible splashing of acids and other chemicals necessarily used in these operations. Defendant's release and termination of employment was in keeping with the essential rights of management reserved to this defendant under the provisions of the Articles of Agreement on which the plaintiff relies in this cause, and was not a matter for arbitration.

Fifth Defense

Defendant avers that the said James D. Sparks, by his action, has waived all question as to the termination or discharge, and that the plaintiff is not now entitled to demand or require arbitration in this cause.

[fol. 30] Sixth Defense

The defendant, American Manufacturing Company, denies that it has refused or failed to perform any obligation required of it as plaintiff has alleged.

Seventh Defense

Defendant shows that the adjudication in favor of the plaintiff in the Circuit Court of Hamilton County, Tennessee, in Cause No. 7898 (Exhibit "A" to this Answer), was the adjudication of a Court of record in favor of the plaintiff, James D. Sparks (for whose use and benefit this present suit is brought), and against the defendant in this cause; and that this was a final adjudication of a permanent-partial disability and a lump sum payment in lieu of weekly benefits, and therefore, was settlement in advance and in full with the said James D. Sparks. That no appeal is pending from said judgment; that the time allowed by law for appeal has elapsed; and that said proceeding and judgment have become res judicata as to said permanent disability, and determinative of this cause for the defendant.

Wherefore, the defendant prays judgment that the complaint of the plaintiff be dismissed, and that the costs be taxed against the plaintiff.

Dated: January 22, 1958.

Harold M. Humphreys, 7th Floor, Hamilton National Bank Building, Chattanooga 2, Tennessee;

Strang, Fletcher & Carriger, By: J. S. Carriger, 1015 Hamilton National Bank Building, Chattanooga 2, Tennessee;

Attorneys for Defendant.

[fol. 31] Certificate of Service (omitted in printing).

EXHIBIT "A" TO ANSWER

RECORD OF PROCEEDINGS IN CIRCUIT COURT OF HAMILTON, TENNESSEE

[fol. 32] To Any One of the Honorable Judges of the Circuit Court of Hamilton County, Tennessee.

IN THE CIRCUIT COURT OF HAMILTON COUNTY, TENNESSEE

Workmen's Compensation Docket

No. 7898

JAMES D. SPARKS, Petitioner,

versus

AMERICAN MANUFACTURING COMPANY and EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN, Defendants.

PETITION FOR WORKMEN'S COMPENSATION

Your petitioner, James D. Sparks, respectfully shows unto the court as follows:

I.

That he, for quite some period of time, has been an employee of the American Manufacturing Company, 124 Chestnut Street, Chattanooga, Tennessee, and, as such was classified as a plating tank operator, that the defendant, American Manufacturing Company, is engaged in the manufacturing business and that the Employers Mutual Liability Insurance Company of Wisconsin, is their Workmen's Compensation Insurance carrier.

II.

That during the latter part of January or the first part of February, 1956, while engaged in this usual employment, he did suffer an "injury by accident," in that he

[fol. 33] suffered a severe injury to his back; that he was sent by the def. ndants to numerous and sundry doctors and after a period of time did return to his employment. That thereafter, and on or about March 29, 1957, he did suffer another "injury by accident" and since this latter date he has no longer been able to perform his duties.

III.

That he therefore suffered an "injury by accident" that arose out of in the "Scope of employment"; that his employer had actual notice thereof and, at his employers' suggestion and direction he furnished certain medical care, treatment and otherwise.

IV.

That his earnings were such as would require the payment to him of the maximum weekly benefits; that since his inability to work he has drawn no compensation payments whatsoever:

Premises Considered, Petitioner Prays:

1. That this Honorable Court entertain this petition, that service be had upon the defendants and that they be required to answer the same within the time required by law and the rules of this Honorable Court.

2. That at the hearing thereof the petitioner be granted those benefits to which he is rightfully entitled under and by virtue of the Workmen's Compensation Act.

3. That the petitioner be granted general relief.

VAN DERVEER & PARKS,
VAN DERVEER & PARKS,
Attorneys for Petitioner,
James D. Sparks.

[fol. 37]

IN THE CIRCUIT COURT OF HAMILTON COUNTY, TENNESSEE

Workmen's Compensation Docket

No. 7898.

JAMES D. SPARKS

Versus

AMERICAN MANUFACTURING COMPANY, and EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN

ORDER AMENDING PETITION—Entered June 4, 1957

Upon application of the defendant and by agreement of the parties it is ordered that the petition, heretofore filed, be and is hereby amended by adding thereto, at the end of Paragraph II, the following:

"That at the end of his first injury he was in the process of lifting a heavy frame from a rack about waist high over his head and in order to do so was required to get in an awkward or strained position; that thereafter, he was, by the defendant, sent to Dr. Guy Francis at Campbell Clinic in Chattanooga, Hamilton County, Tennessee, and received treatment on the following dates 2-6, 2-7, 2-8, 2-18, 2-21, 2-22, 2-27, 2-28, 3-1, 3-6, 3-7, 3-8, 3-10, 3-12, 3-14, 3-15, 3-16, 3-19, 3-20, 3-21, 3-27, 3-24, 3-31, 4-2, 4-9, 4-16, 4-23, 5-2, 5-8, 5-15, 5-22, 5-28, 6-5, 6-12, 6-26, 7-2, 7-10, 7-20, 7-21, 7-30, 7-31, 8-1, 8-2, 8-3, 8-20, 8-23, 8-28, 9-11, 10-18, 11-5, 11-21, 11-27, 12-13, 1956; 1-16, 1-24, 1-29, 2-20, 2-26, 3-22, 3-26, 3-27, 3-30, 4-10, 4-23, 4-30, 5-13, 1957. That in addition thereto he was by these doctors referred to other doctors, where it was determined by myelogram that he was suffering from a ruptured intervertebral disc. That subsequent to the above set forth injury and [fol. 38] while again, on or about March 29, 1957, doing or performing essentially the same type of work, and again lifting a large frame, he again injured, or re-injured his back and/or aggravated the condition here-

inabove set forth, that from the time of the first injury, hereinabove set forth, until the date of the filing of this petition, he has been, and now is, under the care of doctors and physicians of the Defendants' choice."

Entered this 4th day of June, 1957.

R. E. COOPER,
Judge.

VAN DERVEER & PARKS,
Attorneys for Petitioner.

FOLTS, BISHOP & THOMAS,
Attorneys for Defendant.

[fo]. 40]

IN THE CIRCUIT COURT OF HAMILTON COUNTY, TENNESSEE

(Workmen's Compensation Docket)

No. 7898.

JAMES D. SPARKS

Versus

AMERICAN MANUFACTURING COMPANY and EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN

ANSWER.

The defendants, for answer to the petition filed against them in the above styled cause, says;

I.

They admit the allegations of paragraph I of the petition.

II.

They neither admit nor deny the allegations of paragraph IV of the petition, but reserve the right to introduce proof as to the average weekly wages, if this should become material.

III.

They deny the allegations of paragraphs II and III of the petition.

IV.

The defendants rely upon and plead TCA 50-1003 and TCA 50-1017 as a bar to the suit of the petitioner.

[fol. 41]

V.

Defendants deny that they received any notice or had any knowledge of the accident which is alleged to have occurred on March 29, 1957, and therefore plead such lack of notice or knowledge as a bar to the action of the petitioner.

IV.

Defendants deny that petitioner sustained any injury or accident on March 29, 1957, and further deny that on such date petitioner aggravated a previous existing condition of his back or injured or reinjured his back.

FOLTS, BISHOP AND THOMAS.

[fol. 43]

IN THE CIRCUIT COURT OF HAMILTON COUNTY, TENNESSEE

No. 7898.

JAMES D. SPARKS

Versus

AMERICAN MANUFACTURING COMPANY, ET AL.

SETTLEMENT APPROVED—September 9, 1957.

This cause came on to be heard this day before the Hon. R. E. Cooper, Judge of the Circuit Court, upon the petition, the answer, the statements of attorneys for the parties, the testimony of the complainant, introduced in open court upon oath, and upon the entire record of the cause, from which the court finds as follows: That there is a serious dispute between the parties as to whether the accident

which resulted in the complainant's injuries occurred on March 29, 1957, or on February 1, 1956; that there is a serious dispute between the parties as to whether or not the complainant gave notice to the defendants, or either of them, of the alleged accident on March 29, 1957; that there is a serious dispute between the parties as to the amount of temporary total disability suffered by the complainant and also as to the amount of permanent partial disability sustained by the complainant; that the parties hereto have agreed upon a compromise and settlement of the issues involved herein by the terms of which the defendant will pay the bill of Baroness Erlanger Hospital, in the amount of $128.80; the bill of Warren H. Kimsey, M.D. in the amount of $413.00; and in addition will pay the complainant the sum of $3,006.24; and the court being of the opinion that the said settlement and compromise is proper and in all respects in accord with the terms and provisions of the Workmen's compensation law of the State of Tennessee, it is:

[fol. 44] Ordered, adjudged, and decreed that the said compromise and settlement be, and the same hereby is, in all respects approved; that the defendants pay Baroness Erlanger Hospital the sum of $128.80; that the defendants pay Warren H. Kimsey, M. D., the sum of $413.00; and that the complainant have and recover of the defendants the additional sum of $3,006.24, and the costs of this cause, for all of which an execution may issue. Upon payment of the aforesaid sums, the defendants are released from any and all further liability to the complainant.

A statutory lien in the amount of 20% upon the recovery of $3,006.24, is hereby declared in favor of Van Derveer and Parks, Attys. for the complainant.

This 9th day of September, 1957.

R. E. Cooper,
Judge.

Approved for entry:

Van Derveer & Parks,
Attorneys for Complainant.

Folts, Bishop & Thomas,
Attorneys for Defendants.

[fol. 45]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION
Civil Action No. 3147.

UNITED STEELWORKERS OF AMERICA, an Unincorporated Association, Plaintiff,

vs.

AMERICAN MANUFACTURING COMPANY, a Corporation, Defendant.

MOTION FOR SUMMARY JUDGMENT—Filed February 18, 1958

Plaintiff herewith respectfully shows the Court that there is no genuine issue as to any material fact and that plaintiff is entitled to judgment as a matter of law.

Accordingly, plaintiff moves the Court for summary judgment directing defendant to comply with the terms of the collective bargaining contract set out in the complaint and to submit the dispute in question to arbitration.

Cooper, Mitch & Black, By Jerome A. Cooper, 1329 Brown-Marx Building, Birmingham, Alabama.

Copy of the foregoing served by mailing this 17 day of February, 1958, to Messrs. Strang, Fletcher, Carriger & Walker, Hamilton National Bank Building, Chattanooga 2, Tennessee.

Jerome A. Cooper.

[fol. 46]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

(Title omitted)

AFFIDAVIT OF R. W. GODDARD—Filed February 25, 1958

State of Tennessee,
County of Hamilton.

Before me, a notary public in and for said county and state, personally appeared R. W. Goddard who, first being duly sworn, deposes and says:

Affiant is a Staff Representative of United Steelworkers of America, plaintiff in this action. I am assigned to service the Local Union at the plant of defendant, American Manufacturing Company, in which Local James D. Sparks, referred to in the complaint, has membership. The defendant (which I will refer to as the Company) did not state its answer to the grievance referred to in the complaint by writing on the back of the grievance, as is the usual custom. But I was told by representatives of the Company that I would receive the answer to the grievance in writing. The answer which I received from the Company is set forth in the letter of November 19, 1957, attached to my affidavit as Exhibit "A".

[fol. 47] As a representative of the Union, I notified the Company in writing on October 21, 1957, that the grievance of James D. Sparks was to be taken to arbitration. (See Exhibit "B" to my affidavit.) My letter of October 21, 1957, also named the Union's arbitrator, Mr. R. E. Starnes. On or about October 28, 1957, I was notified by Mr. Harold Humphreys by telephone that he, Mr. Harold Humphreys who is the Company's attorney, was to act as the Company's arbitrator. Mr. Humphreys asked me to have the Union's arbitrator write him a letter giving him a list of names of arbitrators that would be agreeable to the Union. On October 30, 1957, a letter was sent to Mr. Harold Humphreys

from Mr. R. E. Starnes listing four names of arbitrators who were acceptable to the Union. (See Exhibit "C" to this affidavit.)

On October 29, 1957, I received a letter from Mr. Humphreys saying the Company was requesting another examination of the grievant, Mr. Sparks. His letter also requested an extension of the five-day period provided in the present contract (see Exhibit "A" to the complaint, Article IV, governing grievance procedure and arbitration). Upon receipt of Mr. Humphreys' letter I called him by telephone to inquire as to what was going on. Mr. Humphreys told me the Company wanted the grievant, Sparks, examined again, to which I did not object, but I did not agree to any further extension of time. At that time, the Plant Manager of defendant wrote me on November 6, 1957, to confirm the rescheduling of the proposed medical examination. (See Exhibit "D" to my affidavit.) I again did not agree to any extension of time. On November 11, 1957, I asked Mr. Alexander, the Company's Plant Manager, if the Company would sign a joint letter to the American Arbitration Association for a list of five names of arbitrators, as provided in the contract. Mr. Alexander said he would not have all the facts until after the re-[fol. 48] examination of grievant, to be made on November 12, 1957. On November 19, 1957, I received, finally, the Company's answer in writing to the grievance, refusing to arbitrate. (See Exhibit "A" to this affidavit.) Now, after giving its answer in writing on November 19, 1957, the Company has failed and refused to designate its arbitrator or to call upon the American Arbitration Association for the third person to act as arbitrator. The Union has been at all times ready and willing to proceed to arbitration as provided in Article IV of our contract.

I am making this affidavit to be submitted in the above proceedings.

R. W. GODDARD.

Sworn to and subscribed before me this 21 day of February, 1958.

LADENIA H. SMITH,
Notary Public.

EXHIBIT "A" TO AFFIDAVIT

American Manufacturing Company
(Metal Stampings and Wire Products)
124 Chestnut Street,
Chattanooga 2, Tennessee,

November 19, 1957

Mr. R. W. Goddard, Staff Representative
United Steelworkers of America
611 Palmetto St.
Chattanooga, Tennessee.

In accordance with your request and in confirmation of our telephone conversation of yesterday we make the following statement.

[fol. 49] The Company feels at this time that the James Sparks question is not arbitrable, since a Hamilton County Circuit Court has adjudicated the matter.

Very truly yours,

AMERICAN MANUFACTURING COMPANY

/s/ W. G. ALEXANDER,
Plant Mgr.

EXHIBIT "B" TO AFFIDAVIT

October 21, 1957

Mr. W. G. Alexander, Chief Engineer
American Manufacturing Company
124 Chestnut Street
Chattanooga, Tennessee.

Dear Sir:

Local Union 4928, United Steelworkers of America, which is the bargaining agency for the employees of your plant, has authorized me to notify you that the Local desires to take the grievance of James Sparks to arbitration, and under Article IV of the present agreement the Union

selects one arbitrator, the Company selects one, and the two get together within ten days to select the third arbitrator.

Local Union 4928 has selected Mr. R. E. Starnes—address, 95 Merritts Avenue, N. E., Atlanta 5, Georgia.

Yours truly,

UNITED STEELWORKERS OF AMERICA

R. W. GODDARD, Staff Representative.

RWG:amc.

cc: Mr. R. E. Starnes, Staff Rep., Atlanta.
Mr. Luther Childs, LU Pres. Chatta.

[fol. 50] EXHIBIT "C" TO AFFIDAVIT

UNITED STEELWORKERS OF AMERICA
AFL-CIO
DISTRICT 35
95 Merritts Avenue, N. E.
Atlanta 8, Georgia

October 30, 1957

Mr. Harold M. Humphreys
Attorney-at-Law
Hamilton Bank Building
Chattanooga, Tennessee.

Dear Sir:

Mr. R. W. Goddard, Field Representative for the United Steelworkers, informed me on the telephone that you were named arbitrator in a case you are familiar with. He suggested that I send you the names of some arbitrators who would be acceptable to us. Listed below are the names of four men on whom the Union would agree to serve as arbitrators.

Dr. J. Fred Holley
University of Tennessee
Knoxville, Tennessee

Paul Sanders
Vanderbilt University
Nashville, Tennessee

Wm. Hepburn
Emory University
P. O. Box 1042
Atlanta, Georgia

Ralph Roger Williams
Attorney-at-Law
Tuscaloosa, Alabama

Please let me know as soon as possible if any of these men would be acceptable to the Company to serve as arbitrators.

Very truly yours,

/s/ R. E. STARNES, Field Rep.

RES: h

cc: Mr. R. W. Goddard

[fol. 51] EXHIBIT "D" TO AFFIDAVIT

American Manufacturing Company
Pressed Metal & Wire Products
Chattanooga, Tennessee

November 6, 1957

Mr. R. W. Goddard, Staff Representative
United Steelworkers of America
611 Palmetto Street
Chattanooga, Tennessee

re: James Sparks Versus American Manufacturing Co.

Dear Mr. Goddard:

This letter is to confirm the rescheduling of the medical examination of James Sparks by Dr. George W. Shelton on Tuesday, November 12, at 1:00 P. M.

It is our understanding that someone at Dr. Shelton's office called and explained to you the necessity for a change in the examination date on account of Dr. Shelton being ill and not having been in his office since last Saturday.

We are sending a copy of this letter to James Sparks so that the change may be confirmed to him also.

Very truly yours,

AMERICAN MANUFACTURING COMPANY

/s/ W. G. ALEXANDER,
Plant Manager.

WGA:j

cc: James Sparks
14 Trewhitt Street
Chattanooga, Tennessee

[fol. 53]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TENNESSEE

SOUTHERN DIVISION

Civil Action No. 3147.

UNITED STEELWORKERS OF AMERICA, an Unincorporated Association, Plaintiff,

vs.

AMERICAN MANUFACTURING COMPANY, a Corporation, Defendant.

AFFIDAVIT OF R. W. GODDARD—Filed March 31, 1958

State of Tennessee,
County of Hamilton.

Affiant is the R. W. Goddard who has previously executed an affidavit in this cause. Attached to this affidavit is a correct copy of the statement of Dr. Kimsey advising that James D. Sparks could return to his former duties.

R. W. GODDARD.

Sworn to and subscribed before me this day of March, 1958.

.....

Notary Public.

September 16, 1957

To Whom It May Concern:

Mr. James Sparks is now able to return to his former duties without danger to himself or to others.

WARREN KIMSEY, M. D.

[fol. 54]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TENNESSEE

SOUTHERN DIVISION

(Title omitted)

OPINION ON MOTIONS FOR SUMMARY JUDGMENT—April 21, 1958

This is a suit filed by a labor union seeking performance of a contract between that union, the United Steelworkers of America, and the American Manufacturing Company. It is alleged that the Company refused to arbitrate a dispute involving one James Sparks, an employee covered by the contract. See American Lava Corp. v. Local Union No. 222, Etc. (6th C. A.), 250 F. 2d 137.

The company maintains that Sparks, having arranged a settlement of a workmen's compensation case against the Company providing that he is permanently partially disabled, is estopped from asserting his seniority rights as an employee; denies that Sparks is physically able to do the work required of his former job; and contends that the contract does not provide for arbitration of this type of dispute.

The contract provides, in Article II, that—"The management of the works, . . . including the right to hire, suspend, transfer, discharge, or otherwise discipline any employee for cause, such cause being . . . any other ground or reason

that would tend to reduce or impair the efficiency of plant operation; . . . is reserved to the Company."

[fol. 55] The contract also provides, in Article XIV, that . . . "The Company and the Union fully recognize the principle of seniority as a factor in the selection of employees for . . . re-employment and filling of vacancies, where ability and efficiency are equal."

The Union contends that the Company violates the above seniority provision in refusing to re-employ Sparks in his former position.

It is admitted that he left his position on account of illness which disabled him, and that he has been awarded workmen's compensation based on a twenty-five per cent partial permanent disability. This award was made in settlement of a claim made by Sparks.

This settlement was approved by the Circuit Court of Hamilton County on September 9, 1957. On September 23, 1957, a grievance was filed on behalf of James Sparks indicating that he was released on September 16, 1957, in violation of his seniority rights.

Can an employee contend, in a workmen's compensation claim, that he is at least twenty-five per cent totally disabled, and, based upon that claim, accept a substantial cash settlement from his employer, and then, within a few days, force the employer to grant to him full seniority rights, or any rights as an employee?

This is not a situation where an employee has been discharged or disciplined for cause under Article III, although it approaches a discharge for reduction in the efficiency in plant operation.

This is a situation where Article XIV, Seniority, applies. The basic question is, can Sparks contend—and this means contend, not prove—that his ability and efficiency are equal to that of the other employees when he has very recently contended, in court, that he is partially permanently dis-

[fol. 56] abled; and the Company, relying on that contention, has settled on him a substantial sum of money to recompense him for that disability.

Res judicata is not involved. This same question has not been before any court.

Judicial estoppel may be involved. In the case of Southern Coal & Iron Co. v. Schwoon, 145 Tenn. 191, at page 226, the Supreme Court of Tennessee said: "The rule that a party will not be allowed to maintain inconsistent positions in judicial proceedings is not strictly one of estoppel, partaking rather of positive rules of procedure based on manifest justice, and to a greater or less degree on the orderliness, regularity, and expedition of litigation." The court there distinguishes between equitable and judicial estoppel, the only difference being that equitable estoppel is available only where a party is prejudiced. Since, in the case now before this Court, the Company would be prejudiced if it were required to hire, as physically unimpaired, a former employee who had received a lump sum payment for a disability the term of which coincided with the term of proposed service, it is only necessary to determine whether an estoppel, equitable or judicial, applies.

Section 67 of the third edition of Gibson's Suits in Chancery describes an estoppel in the following manner—"Whenever A, by acts, words, or silence, intentionally causes or permits B to do a thing he would not otherwise have done, it would be manifestly inequitable for A, by repudiating the very conduct by which he induced B to act, and by setting up rights of his own, inconsistent with his said conduct, to compel B to incur a loss by undoing the very thing A's conduct caused him to do." This definition clearly covers the situation now before this Court.

The defendant has filed a brief opposing the plaintiff's motion for summary judgment, and in its brief has made a [fol. 57] motion for summary judgment on its behalf. While this informal way of submitting a motion for summary judgment is not to be encouraged, yet the Court will consider it as such.

Rule 56 (c), Federal Rules of Civil Procedure, provides that a judgment may be rendered summarily where there is no genuine issue of any material fact, and "that the moving party is entitled to a judgment as a matter of law."

The Court is of the opinion that all the facts are within the record and there is no dispute pertaining thereto. Therefore, the case is a proper one for action upon a motion for summary judgment.

For the reasons heretofore announced, the motion of the plaintiff for summary judgment is denied and the motion of the defendant for a summary judgment is granted, and there will be an order accordingly.

LESLIE R. DARR,
United States District Judge.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

(Title omitted)

ORDER ENTERING SUMMARY JUDGMENT FOR THE DEFENDANT AND DISMISSING COMPLAINT

This case came on to be heard on the motion of the plaintiff for Summary Judgment, and on the affidavits filed in support of and in opposition to said motion, and the [fol. 58] pleadings and the exhibits filed; and the motion having been fully presented on hearing before the Court, and by briefs of counsel for the respective parties; and the defendant having made an informal motion for summary judgment in its behalf;

The Court being of the opinion that the case is a proper one for action upon a motion for summary judgment, and that plaintiff's such motion should be denied, but that defendant is entitled to a judgment in its favor as a matter of law, and that summary judgment should be rendered for the defendant, now for the reasons set out in the Court's memorandum opinion, it is therefore

Ordered, Adjudged and Decreed that summary judgment be entered in favor of the defendant, American Manufacturing Company and against the plaintiff, United Steelworkers of America, and that the complaint be and it is hereby dismissed on the merits with costs.

Enter:

.....
United States District Judge.

Approved for Entry:

Harold M. Humphreys and Strang, Fletcher, Carrigan & Walker, By John Carrigan, Attorneys for Defendant.

[fol. 62] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 13,666

UNITED STEELWORKERS OF AMERICA, an Unincorporated Association, Appellant,

vs.

AMERICAN MANUFACTURING COMPANY, a Corporation, Appellee.

On Appeal From the United States District Court, Eastern District of Tennessee, Southern Division

Appendix of Appellee—Filed October 3, 1958

[fol. 66]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF W. G. ALEXANDER IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT FOR PLAINTIFF—Filed March 28, 1958

State of Tennessee,
County of Hamilton.

Being duly sworn, William G. Alexander deposes as follows:

I, William G. Alexander, am now and was throughout 1957 the Plant Manager of the American Manufacturing

Company in Chattanooga, Tennessee. I reside on Valerian Drive, N., Chattanooga, Tennessee.

The business of our plant is that of metal stamping and the manufacture of wire products.

The James D. Sparks who was the plaintiff in the Workmen's Compensation suit No. 7898 in the Circuit Court of [fol. 67] Hamilton County, Tennessee, brought against the American Manufacturing Company and the Employers Mutual Liability Insurance Company of Wisconsin, is the same person as the James Sparks, for whose use and benefit the present action was brought in this Court.

As said Sparks has averred in the said Circuit Court suit, he first claimed to have hurt his back in the course of his usual employment in our plant in February of 1956. In March, 1957, he claimed to have hurt his back again while doing or performing his same usual kind of work, that is, while lifting a large frame. In that suit in the State Court, said Sparks said that his work involved lifting of frames over his head from a rack about waist high, and that "in order to do so was required to get in an awkward or strained position."

Upon the representation of Mr. Sparks' personal physician, Dr. Warren H. Kimsey, that Mr. Sparks was twenty-five percent permanently partially disabled, a settlement was agreed to in the amount of a lump sum payment of Three Thousand, Six Dollars, Twenty-four Cents ($3,006.24) in addition to the payment of doctors bills totaling Five Hundred Forty-one Dollars, Eighty Cents ($541.80), this matter being presented to the Circuit Court and approval obtained on September 9, 1957, the final order in that Circuit Court case was approved by Attorneys Van Derveer & Parks appearing for said James D. Sparks.

On August 14, 1957, shortly before this Court decision, Dr. Warren Kimsey (the personal physician attending and who had operated on James Sparks) had advised that James Sparks "cannot lift over thirty pounds of weight." He had undergone an operation (an open operation on his back) as to an alleged ruptured intervertebral disc.

On September 4, 1957, Dr. George W. Shelton, on examination of James Sparks, estimated his permanent partial disability at twenty-five percent of the body as a whole.

[fol. 68] Subsequently, when James D. Sparks (or his attorneys for the plaintiff, United Steelworkers of America in his behalf) sought to compel his return or rehiring "at his regular job" we undertook to give him the benefit of the doubt by arranging for a further examination by Dr. George W. Shelton. That examination was held with the approval of both James Sparks and the complainant Union.

On November 14, 1957, Dr. Shelton, after making this examination, reported that he found no reason to change his earlier estimate of permanent partial disability of twenty-five percent of the body as a whole for his particular type of work, and said "it is my opinion that he should not be placed on work requiring heavy lifting, or prolonged stooping or bending." A true copy of Dr. Shelton's letter to American Manufacturing Company dated November 14, 1957 is filed herewith as Exhibit A to this affidavit.

Under these circumstances, I then, on behalf of the American Manufacturing Company, declined to submit the matter to arbitration, for the reason that the question of his disability had been determined by a Court of record, and no claim or insistence was made on his behalf that there was any error or mistake in the determination and award based on permanent partial disability.

Dr. Warren Kimsey on August 14, 1957 had likewise advised plaintiff, James Sparks, of the same permanent partial disability of twenty-five percent, and defendant had been furnished a copy which is fully and correctly quoted in the answer filed in this Court. That letter as there quoted is here incorporated by reference.

In order that the Court may more clearly understand the nature of the work which the complainant Union insists that James Sparks must be returned to, we have had a series of photographs made by Mr. A. Charles Hinkle, a commercial photographer, and file these herewith. These were taken in normal course of operations and none of them were specially posed. These are filed as Exhibits B-1 through B-11 to this affidavit.

[fol. 69] Exhibit picture No. B-1 shows the plating department to which it was requested (see Plaintiff's Exhibit B to its Complaint) that James Sparks be returned to work. Exhibits B-2 through B-10 show typical work procedures

which the men in this department are called on to perform from time to time. All employees in this department are expected and required to take their turns and work interchangeably in the various work performed there. The activities depicted in these pictures and the positions in which workmen are shown, are not posed or staged, but are typical of the positions required in the regular course of the work performed.

Exhibit B-11 shows another part of the work called for and required of men in this department, namely, the cooperation of the workers in the transfer of a load by hand truck up and over one of the ramps. Such work requires the able-bodied assistance of the men of the department, taking their turns, in carrying out this necessary part of the work.

These picture exhibits further show the vats and tanks which contain acids and chemicals necessarily used in the course of defendant's business operations.

These exhibits will, I believe, be of aid to the Court in understanding Article 2 of the Collective Bargaining Contract filed as Exhibit A to the plaintiff's Complaint. The Court's attention is directed to the provision that the management of the works, including the right to hire and to discharge, "is reserved to the company," and especially on any "ground or reason that would tend to reduce or impair the efficiency of plant operation"; and by inference that might be harmful to others.

The defendant, American Manufacturing Company, does not have any light jobs. It has no work to provide James Sparks where he will not be required to bend and stoop and lift, or where he will not at times have to lift weights totalling more than thirty (30) pounds.

William G. Alexander

[fol. 70]

EXHIBIT A TO AFFIDAVIT OF W. G. ALEXANDER

Report of Dr. George W. Shelton

November 14, 1957

American Manufacturing Company
124 Chestnut Street
Chattanooga, Tennessee

Re: James D. Sparks
14 Trewhitt Street
Chattanooga, Tennessee

Att: Mr. Alexander

Dear Sir:

This patient returns stating that he is feeling quite good, though there is still some soreness in his back and if he bends for any length of time he feels the pain. He has slight numbness in his right great toe as compared to the left. He has no feeling of weakness. He says he feels much better than he did prior to the operation, and he attributes this to some 39-pound weight loss since the time before the examination.

On examination at this time he is seen to be a well developed and nourished, slightly obese, colored male who has a well healed surgical scar extending from about L 3 spine to the sacrum. He has tenderness in the mid portion of this scar and over the adjacent lumbar muscles there is some tenderness. He was able to bend at least 75 percent of normal without any complaint of pain on bending. Examination lying revealed that the leg measurements, 5 inches above and below the patellae, were the same. There does seem to be slightly less muscle tone in the right calf than there is in the left. He still has diminished sensation over the right great toe. He still has a diminished right ankle jerk as compared to a very active left ankle jerk. Straight leg raising on the right at 100 degrees caused pain in his low back. There is full motion in all joints of the

lower extremities without any pain, muscle spasm
tenderness. The reflexes were present and active at t
[fol. 71] knee jerks, and he had the diminished right an
jerk already mentioned.

Discussion: I see no reason to change my opinion
stated on the examination of August 28, 1957. The patie
still has diminished sensation, pain on straight leg raisi
tenderness over the scar, and a diminished right ankle je
as compared to the left. At that time I estimated his p
manent partial disability to be 25 percent for the body
a whole for his particular type work. I see no change
the physical findings, so I see no reason to change
opinion as expressed on that examination. It is my opini
that he should not be placed on work requiring heavy li
ing, or prolonged stooping or bending.

Very truly yours,

GEORGE W. SHELTON, M.D.

GWS/ef.

[fol. 73]

EXHIBIT B-1 TO AFFIDAVIT OF W. G. ALEXANDER

Photograph showing plating department where Plaintiff-Appellant sought to return James Sparks to work

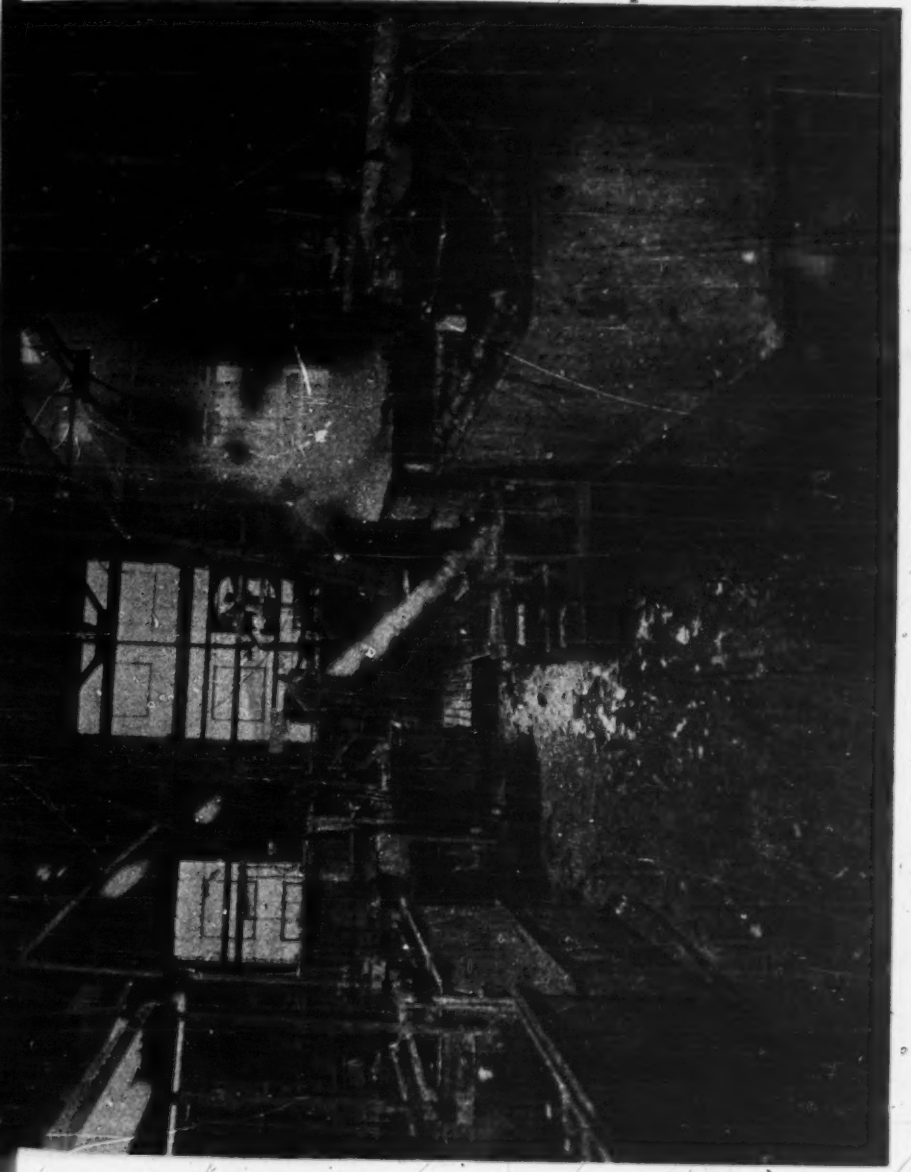

EXHIBIT B-2 TO AFFIDAVIT OF W. G. ALEXANDER

Photograph showing typical work procedure necessary for men in plating department

EXHIBIT B-7 TO AFFIDAVIT OF W. G. ALEXANDER

Photograph showing typical work procedure necessary for men in plating department

[fol. 79]

EXHIBIT B-11 TO AFFIDAVIT OF W. G. ALEXANDER

Photograph showing nature of part of work required

[fol. 81]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF W. NEIL THOMAS, JR.—Filed March 28, 1958

State of Tennessee,
County of Hamilton.

W. Neil Thomas, Jr., being duly sworn, deposes as follows:

I am an attorney practicing law in Chattanooga, Tennessee, being admitted to practice both in the State Courts and in the U. S. District Courts. I am a member of the law firm of Folts, Bishop & Thomas with offices in the James Building in Chattanooga.

The law firm of which I am a member represents in the Chattanooga area the Employers Mutual Liability Insurance Company of Wisconsin. In this connection we appeared as counsel for the defendants, American Manufacturing Company and Employers Mutual Liability Insurance Company of Wisconsin in defense of a Workmen's Compensation suit filed by James D. Sparks in the Circuit Court of Hamilton County, Tennessee, bearing W. C. Docket No. 7898 in that Court. The Employers Mutual Liability Insurance Company of Wisconsin, for the period of time in question, was the Workmen's Compensation insurance carrier covering the American Manufacturing Company.

In that case a settlement was negotiated with Mr. Joe VanDerveer, Attorney, appearing for James D. Sparks. This settlement was based on the insistence of his attorney, and the representation of his physician, Dr. Warren Kimsey, that James D. Sparks was twenty-five percent permanently partially disabled.

In support of the insistence of James D. Sparks made through his attorney, we, for the defendants in that Workmen's Compensation case, were furnished a report from Dr. Warren Kimsey dated August 14, 1957, copy of which is attached to and made an "Exhibit A" to, and part of, this affidavit. In that report Dr. Kimsey stated, "I believe he will have permanent disability as far as the spine is concerned * * *" and "I also believe that his partial permanent disability will remain at about twenty-five percent."

[fol. 82]. After learning that James D. Sparks had asked to be returned to his regular job at American Manufacturing Company, I, on October 30, 1957, wrote James D. Sparks with copy to his attorney, Mr. Joe VanDerveer, pointing out that his then position as to capability to do the work was inconsistent with his position taken in the compensation case. I requested a conference with him and with his attorney, as is shown in said letter, a true copy of which is attached hereto as "Exhibit B" and made a part of this affidavit. No answer or acknowledgment was received either from James L. Sparks or from his attorney.

Neither James D. Sparks, his attorney, nor any physician for him, has ever advised us directly or indirectly that there is actually any change from the twenty-five percent permanent partial disability claimed by James D. Sparks in September, 1957. In that suit Sparks received full Workmen's Compensation benefits under the Tennessee Law by lump sum settlement made by us on behalf of his Employer, American Manufacturing Company, and its Workmen's Compensation insurance carrier in the amount of Three Thousand, Six Dollars, Twenty-four Cents ($3,006.24), plus hospital and doctor's bills totalling Five Hundred Forty-one Dollars, Eighty Cents ($541.80), all based on the representations made by James D. Sparks and his physician that he had a twenty-five percent permanent partial disability.

W. Neil Thomas, Jr.

[fol. 83]

EXHIBIT A TO AFFIDAVIT OF W. NEIL THOMAS, JR.

Report of Dr. Warren Kimsey

PROGRESS NOTES

Mr. James Sparks Age: 24 Ref: Joe VanDerveer
1400 Trewhitt Street
Chattanooga, Tennessee

Date: 14 August 1957

This patient returned today for re-examination. He states that the pain in his right leg has disappeared. He

still has pain and stiffness in his lower back region and also he has some muscle spasm in the lumbar spine when he walks around or exerts himself.

Repeat examination revealed that there was mild muscle spasm in the lumbar muscles and forward flexion was still limitation of lumbar spine motion. This limitation was not as great as it was before operation. Examination of the lower extremities revealed that deep reflexes were plus 2, active and equal, and there was no hypalesia on sensory examination.

This patient is a laborer and he is heavy and obese male. I believe he will have permanent disability as far as his lumbar spine is concerned by reason of having had a herniated disc which necessitated surgery. I believe his disability was 55 or 60 per cent before surgery and I believe it is approximately 25 per cent at the present time. I also believe that his partial permanent disability will remain at about 25 per cent.

WARREN KIMSEY, M. D.

[fol. 84]

EXHIBIT B TO AFFIDAVIT OF W. NEIL THOMAS, JR.

Letter, Oct. 30, 1957 to James D. Sparks

FOLTS, BISHOP & THOMAS
Attorneys & Counselors at Law
Suite 610 James Building
Chattanooga, 2 Tennessee

October 30, 1957

Mr. James D. Sparks
14 Trewhitt Street
Chattanooga, Tennessee

Dear Mr. Sparks:

As you will recall, not too long ago we concluded a compromise and settlement of your workmen's compensation claims against American Manufacturing Company, based upon your representation and that of your Doctor, Warren Kimsey, that you were twenty-five per cent *permanently* partially disabled. It has now come to our attention

that you have applied to be returned to your old job a American Manufacturing Company and that you are in sisting that you are fully capable of performing all of th duties involved in the job. It would seem that your pres ent position with regard to your capability to do the worl is inconsistent with your position taken in your compensa tion case. We therefore request a conference with you an your attorney, Mr. VanDerveer, to ascertain whether o not the promise upon which our settlement was based wa well founded.

Very truly yours,

For Folts, Bishop & Thomas.

WNJR:FJ

cc: Mr. Joe Vanderveer
James Building
Chattanooga, Tennessee

[fol. 85]

In United States District Court

Brief in Opposition to Plaintiff's Motion for Summar Judgment—Filed April 7, 1958

I.

Defendant Requests Summary Judgment in Its Behalf

Plaintiff has filed a motion for summary judgment. How ever, the party e. itled to an order of summary judgmen is the defendant. Professor James Moore, in *Moore's Fe eral Practice* (2d ed.) Vol. 6, p. 2088, paragraph 56.1 says:

> "If either the proponent of the claim or the defend ing party moves for a summary judgment, and th Court finds that the moving party is not entitle thereto, but that the other party is so entitled, it woul seem that the Court has the power to enter the prope judgment, although a cross-motion therefor was no made. Rule 54 (c) gives the Court the power to ente the final judgment to which the prevailing party is en titled, even if the party has not demanded such relie

in his pleadings, except in default judgment cases. The theory is that the form of the pleadings should not place a limitation upon the power of the Court to do justice. So where one party has invoked the power of the Court to render a summary judgment against his adversary, it is reasonable that this invocation gives the Court power to render a summary judgment for his adversary if it is clear that the case warrants that result."

Professor Moore points out that "The great weight of authority, however, dispenses with the formality of a cross-motion and supports the above position of the Treatise."

II.

There Is No Grievance for Arbitration

Plaintiff says that James D. Sparks has a grievance based on alleged violation of Article 14 of the Labor Agreement involving seniority, and that this is an arbitrable [fol. 86] matter on which the Court should in this cause compel arbitration. The labor contract in question was entered into on December 1, 1956.

If there is no grievance requiring arbitration under the provisions of the bargaining contract, this Court, we respectfully submit, should now deny plaintiff's motion for summary judgment, and on the whole record before it, should now grant summary judgment to the defendant and dismiss this cause.

There is no grievance as to which arbitration is provided in the contract; there is no real grievance under any provision of the contract; and none has been substantiated in the record in this cause.

Plaintiff grounds its insistence entirely on an alleged violation of Article 14 (Seniority). It seems clear from the entire contract, that seniority is assured only to able-bodied employees. No provision for permanently disabled employees is contained in the agreement, either in the seniority section or in any other part. The controlling seniority provision is found in the first line at the top of page five of the exhibited copy of the Contract, where the application

of the seniority principle is specifically limited to cases "where *ability* and *efficiency are equal.*"

James D. Sparks, on his own insistence and by decree of Court of record of competent jurisdiction, has been found to be twenty-five (25%) percent less able and efficient than the able-bodied workmen required for the proper efficient operation of this manufacturing plant. His counsel (or rather counsel for the Union) argue that the decree in the State Court was a compromise decree. We assume that they mean by this that he claimed even a greater disability but agreed to settle on twenty-five (25%) percent. Certainly all the medical information and the whole record in this case confirms a permanent disability of at least twenty-five (25%) per cent. The statement of Dr. Kimsey dated September 16, 1957, exhibited to Mr. Goddard's second affidavit, does not show or claim any error or mistake in his earlier determination of the twenty-five (25%) percent permanent disability on August 14, 1957 [fol. 87] (about one month before). It is also significant that in the statement referred to in the grievance report (Exhibit B to the Complaint) Dr. Kimsey, as a part of that same statement also said—"He cannot lift over thirty pounds of weight." Actually Dr. Kimsey's said September 16th statement was signed just seven days following the State Court's award of twenty-five (25%) percent disability on September 9, 1957.

III.

The Work of This Defendant Requires Able-Bodied Employees

Plaintiff has not in any way denied the facts sworn to by Mr. William G. Alexander in his affidavit in this cause, showing that the nature of this defendant's plant is such that they require able-bodied employees; and that defendant does not have work available for an employee who is only three-fourths able-bodied.

In his petition as amended in the State Court, James D. Sparks showed that the nature of his work required stooping, bending and lifting and required him to be in awkward positions. This is further supported by the pictures exhibited to the affidavit of Mr. Alexander.

It is significant that plaintiff now submits to the Court as an exhibit to Mr. Goddard's second affidavit in this cause, a statement dated September 16, 1957, instead of bringing in an affidavit as of the current time which would actually meet the contentions of the defendant. It is also significant that approximately one month prior to this statement just referred to, the same doctor (being the one who had operated on the back of James Sparks), on August 14, 1957 had very positively declared this man to be permanently partially disabled "at about twenty-five (25%) percent." On November 14, 1957, Dr. George W. Shelton found "a permanent partial disability for the body as a whole," of 25% and concluded his report with the statement,

> [fol. 38] "It is my opinion that he should not be placed on work requiring heavy lifting, or prolonged stooping or bending."

Neither the said James D. Sparks nor anyone for him in this cause has ever insisted that there was any mistake in that percentage of disability. Plaintiff has never claimed that there was any error in the court award under the Tennessee Statutes compensating him for a twenty-five (25%) percent permanent disability.

It is pertinent that in the complaint filed here, there is no averment that plaintiff is able to do the work necessary in defendant's plant.

The contract exhibited to the complaint shows that the parties to that contract recognized that in this defendant's plant the nature of the work is such that able-bodied employees are required. On its first page, Article II specifically reserved to management the right to hire, suspend, transfer or discharge any employee for inefficiency, or for any ground or reason that would tend to reduce or impair the efficiency of the plant operation.

IV.

The State Court's Decree Is Res Judicata as to Sparks' Disability

We respectfully submit that the decision of the State Court is final, and is res judicata of the fact that James D.

Sparks is not an able-bodied person, but is twenty-five (25%) percent permanently disabled.

Although the present suit is brought by the United Steelworkers of America, it is solely for the use and benefit of James D. Sparks, the same person who was the plaintiff in the State Court suit. The present defendant, American Manufacturing Company, was a party also to the State case along with its Workmen's Compensation Insurance carrier.

Plaintiff has not shown any grievance which can properly be submitted to arbitration. The first sentence of the grievance and arbitration clause, Article IV of the Contract, provides that

> [fol. 89] "If any employee or employees shall have any grievance," it shall be submitted.

Sparks of his own initiative having sought and obtained a Court ruling of disability, and the compensation benefits allowed by law therefor, cannot now take an opposite position and say, "I'm able-bodied now. My ability and efficiency are equal to those of the able-bodied employees of this plant." It is clear beyond dispute that such statement would not be true.

In fact, plaintiff has not averred any such able-bodied condition. Nowhere in this cause does plaintiff claim that the Circuit Court's finding was erroneous. But plaintiff does now ask this Court to compel arbitration of a matter which has already been decided.

That decision still stands of record in the State Court.

Plaintiff does not in any way attack that decree.

There is no provision in the labor contract for arbitration under these circumstances.

This matter is one beyond dispute and therefore the parties should not be subjected to a useless arbitration proceeding.

It seems to us that should the Court lend its assistance to compel arbitration under these circumstances, the Court in effect would be giving aid to a party seeking to accomplish that to which he is not entitled. We respectfully urge that the Court refuse to lend dignity to what looks like a

scheme to circumvent the binding effect of the earlier action of James Sparks.

V.

The Decree in the State Court Is Binding and Determinative

The Tennessee Supreme Court, in the case of *Cantrell v. Burnett & Henderson Co.*, 187 Tenn. 552, 216 S. W. 2d 307, cites with approval the general rule as followed today, quoting the language as follows:

> "It is a fundamental principle of jurisprudence that material facts or questions, which were in issue in a [fol. 90] former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action between the same parties or their privies, regardless of the form the issue may take in the subsequent action, whether the subsequent action involves the same or a different form or proceedings, or whether the second action is upon the same or a different cause of action, subject matter, claim, or demand, as the earlier action. In such cases, it is also immaterial that the two actions are based on different grounds, or tried on different theories, or instituted for different purposes, and seek different relief; citing cases."
>
> *Cantrell* v. *Burnett & Henderson Co.*, 187 Tenn. 552, 216 S. W. 2d 307 at p. 309, citing and quoting 30 *Am. Jur.* pp. 920-921.

In a still later Tennessee Supreme Court case, it is stated in the opinion.

> "A final judgment or decree of the Court of competent jurisdiction, once pronounced on a question directly involved in the action, is conclusive between the parties."
>
> *Rutledge* v. *Rutledge* (1955), 198 Tenn. 665, 281 S. W. 2d 666 at 667.

VI.

This Court Can Properly Hold, Under These Circumstances, That This Matter Is Not Arbitrable

The contract before the Court does not give to the arbitrator any right to determine whether any given question is arbitrable.

The question presented is not one as to the "meaning, application, or operation" of the agreement. (See first sentence of Agreement—Article IV.)

[fol. 91] The record, as fully tested by the Motion for Summary Judgment and the affidavits pursuant thereof, shows: (1) That substantial permanent disablement has been conclusively determined; and (2) that there is no provision in the labor agreement for arbitration of the question on which plaintiff seeks to compel arbitration.

The U. S. Court of Appeals for the Sixth Circuit in March, 1957, said:

> "We are of the opinion that the question of whether an issue is an arbitrable one under a contract of arbitration is a legal question for the Court rather than for the arbitrator in the absence of a contract giving the arbitrator such jurisdiction."
>
> *International Union, etc.* v. *Benton Harbor Malleable Industries*, 242 Fed. 2d 536, at pp. 539, 540.

The Court of Appeals did not alter that rule or holding in the *American Lava* decision. The Court of Appeals in that opinion held that the American Lava dispute involved an interpretation of the meaning or application of the contract. The Court said:

> "The subject of the payment of a Christmas bonus was, therefore, under the terms of the bargaining contract, a matter for arbitration. • • • "
>
> *American Lava Corporation* v. *Local Union No. 222*, etc., —— Fed. 2d —— (decided January 2, 1958).

Conclusion

It has been found by Court decision that James Sparks is twenty-five (25%) percent permanently disabled. That decision is recognized and acquiesced in by him. The plant management has also been informed by James Sparks' own physician that he should not lift over thirty pounds of weight. Dr. George W. Shelton (a recognized specialist in bone and joint surgery), on November 14, 1957, warned defendant that this man "should not be placed on work re-
[fol. 92] quiring heavy lifting, or prolonged stooping or bending." Under these circumstances the defendant owes an obligation both to James Sparks and to those employees working in and around the vats of acids and other chemicals. It appears from the petition as amended in the State Court that this work was in excess of Sparks' physical ability even before he became so disabled. To require defendant to delegate to an arbitrator the responsibility for employing this disabled person, and exposing him and those working with him to such dangers, goes far beyond the scope and intention of the labor contract on which the plaintiff Union relies. Decisions of this kind were by that contract reserved to management. Such decisions cannot properly be delegated to a stranger having neither the experience nor the responsibilities of the employer, even though he be an experienced arbitrator. Certainly, where the contract makes no provision for arbitration of such a matter, this Court will not lend itself to plaintiff's efforts to compel an arbitration.

We believe it is now proper for the Court to deny plaintiff's motion and to now enter summary judgment in favor of the defendant, American Manufacturing Company.

Respectfully submitted,

Harold M. Humphreys, 6th Floor, Hamilton National Bank Bldg., Chattanooga 2, Tennessee;

Strang, Fletcher, Carriger & Walker, By: John S. Carriger, 1015 Hamilton National Bank Building, Chattanooga 2, Tennessee;

Attorneys for Defendant,
American Manufacturing Company.

[fol. 94] MINUTE ENTRY OF ARGUMENT AND SUBMISSION—February 12, 1959 (omitted in printing)

[fol. 95]

IN UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JUDGMENT—March 19, 1959

Appeal from the United States District Court for the Eastern District of Tennessee

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

[fol. 96] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 13,666

UNITED STEELWORKERS OF AMERICA, Appellant,

v.

AMERICAN MANUFACTURING COMPANY, Appellee.

Appeal from the United States District Court for the Eastern District of Tennessee, Southern Division

OPINION—Decided March 19, 1959

Before: Allen, McAllister and Miller, Circuit Judges.

Miller, Circuit Judge. This action was brought by the appellant, a labor organization, under Sec. 301 (a) of the

Labor-Management Relations Act of 1947, Sec. 185 (a), Title 29, U. S. Code, to compel the appellee employer to arbitrate a grievance as provided by the provisions of a collective bargaining agreement between the parties. The District Judge denied the relief prayed for and entered summary judgment for the appellee.

The grievance, upon which arbitration was sought, arose out of the following circumstances. On or about March 29, 1957, James Sparks, an employee of the appellee and who was a plating tank operator, suffered a work-connected injury to his back. It was necessary for Sparks to discontinue his employment by reason of this injury. By virtue of proceedings under the Workmen's Compensation Act of Tennessee, Sparks obtained a compromise settlement and award under which the appellee was ordered to pay to [fol. 97] Sparks in addition to the payment of certain hospital and medical expenses in the total amount of $541.80, the sum of $3,006.24, which compromise award was approved by the State Court having jurisdiction of the cause on September 9, 1957. This settlement was negotiated and effected upon the representation of Sparks' attorney and the written report of Sparks' physician made on August 14, 1957, that Sparks had a permanent-partial disability to his spine of about 25 per cent. The court order approving the settlement and making the award referred to the serious dispute between the parties as to the amount of temporary total disability and as to the amount of permanent partial disability suffered by Sparks, but made no finding with respect thereto.

The award was promptly paid. Some two weeks thereafter Sparks applied to be returned to his old job with the appellee, taking the position that he was fully capable of performing all of the duties involved in the job. This position was based in part upon a written and signed statement of September 16, 1957, by the same physician who made the report of August 14, 1957, reading as follows, "To Whom It May Concern: Mr. James Sparks is now able to return to his former duties without danger to himself or to others." On September 23, 1957, the appellant filed a Grievance demanding that the appellee return Sparks to his regular job and pay him for all time lost

since September 16, 1957. On October 30, 1957, appellee's attorneys wrote Sparks, sending a copy to his attorney, that his present position with regard to his capability to do the work was inconsistent with his position taken in the compensation case and requested a conference. No answer to this letter was received from Sparks or his attorney. On November 19, 1957, appellee wrote the appellant, "The Company feels at this time that the James Sparks question is not arbitrable, since a Hamilton County Circuit Court has adjudicated the matter." This action followed on December 19, 1957.

The District Judge was of the opinion that the appellee would be prejudiced if it was required to hire, as physically unimpaired, a former employee who had received a lump sum payment for a disability, the term of which coincided with the term of proposed service, and that it would be manifestly inequitable for Sparks, by repudiating the very conduct by which he induced the appellee to act, to now [fol. 98] take a position inconsistent with such conduct and compel appellee to incur a loss. Applying the foregoing principle of estoppel he sustained appellee's motion for summary judgment.

It may be that the principle of estoppel is applicable to this case and would bar Sparks from reinstatement to his former position. But appellant contends that the District Court did not have the authority or jurisdiction to make such a ruling. The collective bargaining agreement did not confer such authority upon it. On the contrary, Article IV of that agreement providing for grievance procedure states that if a satisfactory agreement with respect to a complaint can not be reached through the procedure provided, "the same shall be submitted to arbitration for a decision as hereinafter provided, and such decision shall be final and binding on both parties." If the grievance is an arbitrable one under the provisions of the collective bargaining agreement, appellant has the right to have this issue, including appellee's defense of estoppel, decided by the arbitrators instead of by the Court. *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U. S. 448; *Local 19, Warehouse, etc.*, v. *Buckeye Cotton Oil Co.*, 236 F. (2) 776, C. A. 6th.

We recognize that under the ruling of this Court the question of whether an issue is an arbitrable one under the collective bargaining agreement is a question of law for determination by the Court. *International Union, etc.*, v. *Benton Harbor Malleable Industries*, 242 F. (2) 536, 539-540, C. A. 6th, cert. denied, 355 U. S. 814; *Local No. 149, etc.*, v. *General Electric Co.*, 250 F. (2) 922, C. A. 1st, cert. denied, 356 U. S. 938. In *American Lava Corporation* v. *Local Union No. 222, etc.*, 250 F. (2) 137, C. A. 6th, we held the grievance there involved to be arbitrable and required the employer to arbitrate. We did not, however, attempt to adjudicate the grievance on its merits.

Nor do we think that arbitration could be denied as a matter of law on the ground relied upon by the appellee, namely, that the issue involved had previously been adjudicated by the Hamilton County Circuit Court. Contrary to appellee's contention, there has been no adjudication that Sparks was 25 per cent permanently disabled. The State Court judgment in the Workmen's Compensation proceeding referred to the dispute existing between the parties with respect to the injuries and approved a com-[fol. 99] promise settlement without making a finding on the extent of the injuries. The question of estoppel may be involved, but the nature and extent of Sparks' injuries were not judicially determined.

However, it is settled law that the judgment of the trial court should be affirmed if the appellate court is of the opinion that it is correct, even though for reasons different from those relied upon by the trial judge. *Helvering* v. *Gowran*, 302 U. S. 238, 245; *J. E. Riley Investment Co.* v. *Commissioner*, 311 U. S. 55, 59. If the grievance was not an arbitrable one as a matter of law, the judgment dismissing the action must be affirmed. *International Union, etc.*, v. *Benton Harbor Malleable Industries*, supra, 242 F. (2) 536, C. A. 6th, cert. denied, 355 U. S. 814. Accordingly, we consider that question.

Article XIV of the collective bargaining agreement states that the company and the Union fully recognize the principle of seniority as a factor in reemployment and filling of vacancies "where ability and efficiency are equal."

Article II provides, "If any discharged * * * employee contends that he was not guilty of the cause given, he may question his discharge by filing written protest within three (3) working days from the date of his discharge * * *. Should the parties fail to agree the arbitration clause may be invoked."

Article IV provides the Grievance Procedure and Arbitration. It states, "If any employee * * * shall have any grievance as to the meaning, application, operation of any provision of the agreement, the same shall be promptly submitted by such employee * * * to the Foreman of the Department in which the grievance arises." After providing for further processing of the grievance at different levels, it provides that if a satisfactory agreement on the complaint can not be reached, "the same shall be submitted to arbitration for a decision as hereinafter provided, and such decision shall be final and binding on both parties." Another paragraph of Article IV provides, "Any disputes, misunderstandings, differences or grievances arising between the parties as to the meaning, interpretation and application of the provisions of this agreement, which are not adjusted as herein provided, may be submitted to the Board of Arbitration for decision."

Appellant contends that the refusal of the appellee to restore Sparks to his former position in accordance with [fol. 100] his seniority rights is in effect a discharge for cause, which may be challenged by the employee under Article II. Appellee contends that under Article XIV Sparks' right to reemployment by reason of seniority is conditional upon his ability and efficiency being equal to that of other employees, and that by reason of his permanent, partial disability his ability and efficiency is not equal to that of other employees and that he is not physically able to perform the duties of the job. Appellant's reply to this is that Sparks' ability and efficiency is a factual issue about which the parties disagree. We are of the opinion that a dispute or difference exists between the parties, which, under Article IV, the appellant would be entitled to have submitted to arbitration, unless barred for the reason hereinafter discussed.

In *International Union, etc.*, v. *Benton Harbor Malleable Industries*, supra, 242 F. (2) 536, 540, C. A. 6th, cert. denied, 355 U. S. 814, we indicated, without deciding, that a frivolous, patently baseless claim is not sufficient to raise an arbitrable issue. In *Local No. 205, etc.*, v. *General Electric Co.*, 233 F. (2) 85, 101, C. A. 1st, affirmed, 353 U. S. 547, the Court expressed the same view. There is other authority to this effect. *Annotation*, 24 A. L. R. (2) 762, 764. See also: *Engineers Association* v. *Sperry Gyroscope Co., etc.*, 251 F. (2) 133, 136-137, C. A. 2nd. We believe that such a rule is applicable to this case.

In his petition in the Workmen's Compensation suit, filed May 10, 1957, and amended June 4, 1957, Sparks alleged that his usual employment required him to lift heavy objects from a rack about waist-high over his head and in order to do so was required to get in an awkward or strained position, that during the last part of January or the first part of February, 1956, while engaged in his usual employment, he suffered a ruptured intervertebral disc for which he received treatment at Campbell Clinic in Chattanooga, Tennessee, on sixty-six different days since February 6, 1956, that on or about March 29, 1957, while performing essentially the same type of work and again lifting a large frame, he again injured or reinjured his back and aggravated the condition above referred to, and since that date he had no longer been able to perform his duties.

On August 14, 1957, Sparks' personal physician who had performed an operation on Sparks advised that Sparks could not lift over thirty pounds of weight and made a [fol. 101] written report in which he stated that he believed Sparks would have permanent disability as far as his lumbar spine was concerned by reason of having had a herniated disc which necessitated surgery, and "I believe his disability was 55 or 60 per cent before surgery and I believe it is approximately 25 per cent at the present time. I also believe that his partial permanent disability will remain at about 25 per cent."

On August 28, 1957, Dr. Shelton examined Sparks for the appellee and reported that he estimated his permanent partial disability to be 25 per cent for the body as a whole for his particular type of work. On November 14, 1957, Dr.

Shelton again examined Sparks and made a detailed report in writing to the appellee which concluded with the statement, "I see no reason to change my opinion as stated on the examination of August 28, 1957. * * *, I see no change in the physical findings, so I see no reason to change my opinion as expressed on that examination. It is my opinion that he should not be placed on work requiring heavy lifting, or prolonged stooping or bending." An affidavit by the Plant Manager of the appellee stated that the appellee did not have any light jobs and that it had no work to provide Sparks where he would not be required to bend and stoop and lift, or where he would not at times have to lift weights totaling more than thirty pounds. This was supported by photographs taken in the normal course of operations showing the plating department where Sparks worked, typical work procedure necessary for men in the plating department and the heavy nature of part of the work required.

It will be noticed that the September 16, 1957, statement of Sparks' physician that "Mr. James Sparks is now able to return to his former duties without danger to himself or to others," makes no specific findings resulting from an examination subsequent to August 14, 1957, does not attempt to explain why the 25 per cent permanent disability existing on August 14, 1957, no longer existed, and in fact does not state that the 25 per cent permanent disability does not still exist. The statement that Sparks could return to work "without danger to himself or to others" falls far short of saying that he could return to his former position with "ability and efficiency" equal to that of other employees, which is necessary in order for him to claim his seniority rights under Article XIV. In fact, considered [fol. 102] in the light of the allegations of the complaint as amended in the Workmen's Compensation case, the kind of work Sparks would be required to do, and the findings in the three physical examinations made of Sparks during the preceding thirty-three days, it is so lacking in probative value with respect to the issue in this case as to compel the conclusion that the so-called claim or grievance is a frivolous, patently baseless one, not subject to arbitration under the collective bargaining agreement between the parties.

The judgment of the District Court is affirmed.

[fol. 103] Petition for rehearing covering 6 pages filed April 3, 1959 omitted from this print.

It was denied, and nothing more by order April 10, 1959.

[fol. 108]

IN UNITED STATES COURT OF APPEALS

ORDER DENYING REHEARING—Filed April 10, 1959

Appellant's petition for rehearing having been considered by the Court,

It Is Ordered that said petition be denied.

[fol. 109] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 110]

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1958

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—June 4, 1959

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 28, 1959.

Potter Stewart, Associate Justice of the Supreme Court of the United States.

Dated this 4th day of June, 1959.

[fol. 111]

SUPREME COURT OF THE UNITED STATES

No. 360, October Term, 1959

[Title omitted]

ORDER ALLOWING CERTIORARI—November 9, 1959.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration or decision of this application.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 360

UNITED STEELWORKERS OF AMERICA,
Petitioner,

v.

AMERICAN MANUFACTURING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No.

UNITED STEELWORKERS OF AMERICA,
Petitioner,

v.

AMERICAN MANUFACTURING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on March 19, 1959.

OPINIONS BELOW

The opinion of the District Court is not reported. The opinion of the Court of Appeals is reported at 264 F. 2d 624. Both opinions are reproduced in the appendices to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on March 19, 1959. A petition for rehearing was denied on April 10, 1959. On June 4, 1959, Mr. Justice Stewart, Circuit Justice for the Sixth Circuit, issued an order extending time for filing a petition for certiorari in this case to and including August 28, 1959. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U. S. C. §1254(1).

QUESTIONS PRESENTED

In an action under Section 301(a) of the Labor Management Relations Act to compel arbitration pursuant to a collective bargaining agreement which provides for arbitration of any grievance involving the interpretation or application of the collective bargaining agreement, is it the function of the federal court to examine the merits of the grievance sought to be arbitrated in order to determine whether it is well-based or baseless?

STATUTE INVOLVED

Section 301(a) of the Labor-Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C. §185, provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

This action was brought by the United Steelworkers of America (hereinafter called the Union) against American Manufacturing Company (hereinafter called the Company) to specifically enforce the arbitration clause of the collective bargaining agreement in effect between the parties. (R. 6a-22a)[1] That agreement, like most collective bargaining agreements in the United States, contained a procedure for the adjustment of "any grievance as to the

[1] That portion of the record which is taken from the appendices to the briefs filed by the parties in the Court of Appeals is paginated in the manner in which the appendices were paginated: pages taken from the Appellant's appendix are numbered 1a to 61a, and pages from the Appellee's appendix are numbered 1b to 29b.

meaning, application, operation of any provision of the agreement." (R. 8a) In typical fashion, this procedure provided for several steps consisting of discussions between Union and Company representatives at ascending levels of authority, and it further provided that

> "*any* disputes, misunderstandings, differences or grievances arising between the parties as to the meaning, interpretation, and application of the provisions of this agreement, which are not adjusted as herein provided, may be submitted to the Board of Arbitration for decision." (R. 8a-9a, emphasis supplied.)

The grievance in this case involved an employee covered by the agreement, James B. Sparks, who had been off the job due to an injury suffered in the plant. While off work, he brought an action in a state court for workmen's compensation benefits. (R. 32a-33a) At that time, Sparks' physician expressed the opinion that the injury had resulted in a permanent partial disability of 25%. (R. 19b) The extent of permanent partial disability, if any, was an issue in that case, and was left unresolved when the claim was settled on September 9, 1957, by the entry of a consent decree awarding Sparks $3,006.24 plus medical and hospital fees and court costs. (R. 43a-44a)

Thereafter, Sparks applied for reinstatement to his job. He submitted a statement from his physician certifying that "Mr. James Sparks is now able to return to his former duties without danger to himself or to others." (R. 53a) The Company refused to reinstate him. On September 23, 1957, the Union filed a grievance (R. 22a-23a) asserting that Sparks was entitled to return to his job by virtue of Article XIV, Seniority, of the collective bargaining agreement, which provided:

> "The Company and the Union fully recognize the principle of seniority as a factor in the selection of employees for promotion, transfer, lay-off, re-employment,

and filling of vacancies, where ability and efficiency are equal." (R. 13a)

No settlement was reached, and on October 21, 1957, the Union wrote the Company that it intended to submit the question to arbitration. (R. 49a) In the same letter, the Union, in accordance with the procedure established in the agreement, submitted the name of one person whom it had selected to sit on the Board of Arbitration which would hear the dispute. On October 28, the Company's attorney notified the Union that he would be the Company's representative on the Board of Arbitration. (R. 47a) The Union then submitted to the Company a list of names of possible impartial members of the Board. (R. 50a)

On October 29, the Company requested a delay in the selection of arbitrators in order to enable its own doctor to re-examine Sparks. (R 47a) The examination was held, and the Company's doctor reported that in his view Sparks "should not be placed on work requiring heavy lifting, or prolonged stooping or bending." (R. 7b) "Under these circumstances" the Company declined to arbitrate (R. 4b), and it informed the Union that it considered the grievance not arbitrable, "since a Hamilton County Circuit Court has adjudicated the matter." (R. 49a)

The Union then filed the present action to compel arbitration. (R. 2a) After the Company filed its answer (R. 25a), the Union moved for summary judgment. (R. 45a) The case was argued and submitted on the basis of the pleadings and affidavits filed by the parties.

The Company contended that it was not obligated to arbitrate the issue of Sparks' right to reinstatement because Sparks' attorney and physician had asserted in connection with the workmen's compensation proceeding that Sparks was 25% permanently disabled. The Company also raised as a defense the fact that a settlement decree had been entered in that case, although the decree itself stated that "there is a serious dispute between the parties as to the

amount of temporary total disability suffered by the complainant and also as to the amount of permanent partial disability sustained by the complainant." (R. 43a)

The Union, while disputing the Company's arguments based on the workmen's compensation proceeding, urged that these arguments related only to the merits of the grievance and should thus be made before the Board of Arbitration. The question before the court, the Union urged, was simply whether there was an unresolved dispute involving the application of Article XIV of the agreement in the Sparks case.

The district court and the court of appeals each upheld the Company. The district court granted summary judgment for the Company on the ground that the Union was estopped from asserting that Sparks was equal in "efficiency and ability" to other employees because of his contrary position in the earlier workmen's compensation proceedings. The court of appeals affirmed, although it expressly disagreed with the lower court's reasoning.

The opinion of the court of appeals began by rejecting the estoppel theory on which the district court had based its decision, stating that "if the grievance is an arbitrable one under the agreement, appellant has the right to have this issue, including appellee's defense of estoppel, decided by the arbitrators instead of by the Court." (Appendix B p. 25, 264 F. 2d at 626) The court then dismissed the Company's contention that the issue raised by the grievance had been settled by the consent judgment in the workmen's compensation case, pointing out that "the nature and extent of Sparks' injuries were not judicially determined." (Appendix B p. 26, 264 F. 2d at 626)

Having disposed of those preliminary issues, the court turned to an examination of the applicable provisions of the collective agreement, and concluded that the dispute between the parties concerned the proper application of the seniority Article in Sparks' case, and was therefore a dis-

pute which "the appellant would be entitled to have submitted to arbitration, unless barred for the reason hereinafter discussed."

At this point, the court examined the evidence concerning Sparks' physical condition and the kind of work which is performed in the Company's plant. It considered the allegations in Sparks' workmen's compensation complaint as to the nature of the work he had performed and the nature of his injury, it reviewed the various medical reports which both the Company's and Sparks' doctors had made at various times concerning Sparks' condition, and it cited the affidavit of the Plant Manager which described the work which Sparks would do if he were reinstated and which was accompanied by photographs showing work procedure in the plant. Against this evidence it weighed the statement of Sparks' doctor that Sparks was able to return to work, and concluded that

> "in the light of the allegations of the complaint as amended in the Workmen's Compensation case, the kind of work Sparks would be required to do, and the findings in the three physical examinations made of Sparks in the preceding thirty-three days, it is so lacking in probative value with respect to the issue in this case as to compel the conclusion that the so-called claim or grievance is a frivolous, patently baseless one, not subject to arbitration under the collective bargaining agreement between the parties." (Appendix B p. 30, 264 F. 2d at 628)

The court did not hold that under the agreement the Union could never compel arbitration of a claim that an employee, laid off due to injury, was sufficiently recovered to be entitled to reinstatement. Rather, it held that an issue which would otherwise be arbitrable will be rendered not arbitrable if the court, after examining the evidence relevant to the determination of that issue on its merits, decides that

the evidence is so overwhelmingly in favor of the Company's position that the Union's claim is baseless.

REASONS FOR GRANTING THE WRIT

1. This case presents an important question of federal law which has not been, but should be settled by this Court. The broad issue in this case is one which necessarily arises in every action under Section 301 to compel arbitration pursuant to an arbitration provision in a collective bargaining agreement. That is the question of how the court should determine whether the dispute which is sought to be arbitrated is "arbitrable" under the agreement involved. The aspect of that question which has most frequently arisen, and which has caused the greatest amount of difficulty, is whether it is the function of the court, before compelling arbitration, to examine the merits of the dispute in order to determine whether the Union's claim is soundly based, or whether the court should compel arbitration regardless of its view of the merits of the particular dispute, so long as it is the kind of dispute covered by the arbitration clause of the agreement. That is the question which this case squarely raises.

The issue is one which has long been a subject of litigation in the state courts, and of discussion by legal commentators. In 1947, the New York Court of Appeals rendered a per curiam affirmance of a decision which has become the leading case in support of the approach taken in the present case. The holding of the New York Appellate Division, which the Court of Appeals affirmed, was that "the mere assertion by a party of a meaning of a provision which is clearly contrary to the plain meaning of the words cannot make an arbitrable issue. . . . If the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration." *International Ass'n of Machinists* v. *Cutler-Hammer, Inc.*, 67

N.Y.S. 2d 317, 271 App. Div. 917 (1st Dep't) *aff'd*, 297 N. Y. 519, 74 N. E. 2d 464 (1947). This theory has become known as the *Cutler-Hammer* doctrine. Very few legal theories have been the subject of as much commentary, or as much criticism.[2] Students of arbitration agree —virtually unanimously—that the entire purpose of the arbitration process is subverted if the court refuses to compel arbitration of a dispute on the ground that one party's position in that dispute is unsound, since this is just the sort of judgment the parties have agreed that only the arbitrator should make. In accordance with this view, the draftsmen of the Uniform Arbitration Act have eliminated the possibility of a *Cutler-Hammer* result by providing in section 2(c) that

> "an order for arbitration shall not be refused on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown."

Recent New York decisions have been interpreted by some observers as retreating from the *Cutler-Hammer* view,[3] but

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[2] See, e.g., Freidin, Labor Arbitration and the Courts 7 (1952); Mayer, *Judicial "Bulls" in the Delicate China Shop of Labor Arbitration*, 2 Lab. L. J. 502 (1951); *Report of Committee on Arbitration of National Academy of Arbitrators*, 16 Lab. Arb. 994 (1951); Summers, *Judicial Review of Labor Arbitration or Alice Through the Looking Glass*, 2 Buff. L. Rev. 1 (1952); Kharas, *Labor Arbitration—The Arbitrable Issue*, N. Y. U. Fifth Annual Conference on Labor 663 (1952); Cox, *Legal Aspects of Labor Arbitration in New England*, 8 Arb. J. 5 (1953); Gross, *Judicial Control of Arbitrator's Jurisdiction in New York*, 38 Corn L. Q. 391 (1953); Mayer, *Arbitration and the Judicial Sword of Damocles*, 4 Lab. L.J. 723 (1953); Note, *Judicial Innovations in the New York Arbitration Law*, 21 U. of Chi. L. Rev. 148 (1953); Rosenfarb, *The Courts and Arbitration*, N. Y. U. Sixth Annual Conference on Labor 161 (1953).

[3] See Note, 10 Syracuse L. Rev. 278 (1959); Kharas & Koretz, *Judicial Determination of the Arbitrable Issue*, 11 Arb. J. 135 (1956). The cases which seem inconsistent with *Cutler-Hammer* are *Matter of Bohlinger*, 305 N. Y. 539, 114 N.E. 2d 31 (1953); *Matter of Teschner*, 309 N.Y. 972, 132 N.E. 2d 333 (1956); *Matter of Potoker*, 2 N.Y. 2d 553, 141 N.E. 2d 841 (1957).

as the present case illustrates, the doctrine still is widely followed.

The issue has been a great source of uncertainty, and therefore of unnecessary litigation, in the federal courts since the decision of this Court in *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957), holding that Section 301 of of the Labor-Management Relations Act authorized specific enforcement of arbitration provisions in collective bargaining agreements. In most suits under Section 301 since that time the question presented here has been raised, and the courts have resolved it in a variety of different ways. The paramount importance of this question under Section 301 has been widely recognized. See Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482 (1959); Note, *Some Problems Relating to Judicial Protection of the Right to Have Arbitration Agreements Enforced Under Section 301(a) of the Taft-Hartley Act*, 59 Colum. L. Rev. 153 (1959); Note, *Judicial Determination of Arbitrability—A Survey of the Federal Cases under Section 301 of the Taft-Hartley Act*, 10 Syracuse L. Rev. 278 (1959).

Most of the federal decisions have started from the premise that the question whether the particular dispute involved is made arbitrable by the agreement is a preliminary question which the court must decide, and is not one which the court can require the parties to submit to the arbitrator. *E.g., Local 149, American Fed. of Technical Engineers* v. *General Elec. Co.*, 250 F. 2d 922 (1st Cir. 1957), *cert. denied*, 356 U. S. 938 (1958). There is some authority, however, for the view that "questions as to the arbitrability of . . . disputes are initially for the arbitrators and if they reach a wrong conclusion in that regard it is subject to correction by a court." *Food Handlers Local 425* v. *Pluss Poultry, Inc.*, 260 F. 2d 835, 838 (8th Cir. 1958). See also *Insurance Agents Int'l Union* v. *Prudential Ins. Co.*, 122 F. Supp. 869 (E. D. Pa. 1954); *United Cement Workers* v.

Allentown Portland Cement Co., 30 Lab. Arb. 812 (E. D. Pa. 1958). Since the issue of arbitrability is itself an issue as to the interpretation and application of the agreement, the view that it should be decided by the arbitrator would appear to have merit. See 72 Harv. L. Rev. 577 (1959). Such an approach would, of course, eliminate the *Cutler-Hammer* problem, but it is not one which has so far found much acceptance in the lower federal courts.

Among the majority of federal decisions in this area, which hold that arbitrability is a question for the court, there is a great difference of opinion as to how a court should decide whether a particular dispute is arbitrable. It is clear that "the *Cutler-Hammer* doctrine is not an inescapable logical consequence of the rule that the Court must determine the question of arbitrability." Cox, *Current Problems in the Law of Grievance Arbitration*, 3 Rocky Mt. L. Rev. 247, 261 (1958). Nevertheless, a number of federal courts, like the Sixth Circuit in the present case, have adopted the *Cutler-Hammer* view that at least a preliminary inquiry into the merits of a grievance must be made in order to determine whether it is "baseless" or "frivolous." *E.g., American Stores Co.* v. *Johnston*, 171 F. Supp. 275 (S.D., N.Y. 1959) (grievance held not arbitrable), *Butte Miners Union* v. *Anaconda Co.*, 159 F. Supp. 431 (D. Mont. 1958), *aff'd per curiam*, 44 L.R.R.M. 2475 (9th Cir., June 30, 1959) (grievance held arbitrable).

Other cases are apparently based on the same premise, although they do not expressly state it. For example, in *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 44 L.R.R.M. 2567 (5th Cir., July 30, 1959) the court held not arbitrable a grievance which alleged that the Company had violated the collective agreement when it subcontracted work formerly done in the bargaining unit, on the ground that in the court's view the agreement did not restrict the Company's right to subcontract. This seems to be essentially a holding that the grievance is not arbitrable because

the Union's position on the merits is "baseless." To the same effect is *Kroger Co.* v. *Local No. 347, Amalgamated Meat Cutters,* 41 L.R.R.M. 2545 (S.D., W.Va., Jan. 30, 1958), in which the court held not arbitrable a union's claim that permitting outside salesmen to do certain work in the store violated the agreement. There also the court held that the contract when read in the context of prior union-company negotiations did not restrict management's right to allow work to be done by outsiders.

Other decisions by federal courts seem to conflict with the decisions cited above. The case which is most clearly in conflict with the *Cutler-Hammer* view is *New Bedford Defense Prod. Div.* v. *Local No. 1113, UAW,* 258 F. 2d 522 (1st Cir. 1958). There the Court expressly rejected the notion that an issue ceases to be arbitrable when "its correct disposition on the merits . . . [is] clear under the terms of the agreement."

> "[We] think that the jurisdiction of the arbitrator, whose judgment is invoked in the collective bargaining agreement instead of that of the court, is similar to a court's jurisdiction. If the subject matter of a claim is within the court's jurisdiction, the court does not lose its jurisdiction because of the fact that the proper disposition of the claim may be crystal-clear under the law. Indeed, if in the present case the grievance in question is confided to an arbitrator by the collective bargaining agreement, the court in a § 301 proceeding has no business to concern itself with a preliminary question whether the answer to the grievance on its merits may or may not be entirely clear under the language of the agreement." 258 F. 2d at 526.

A decision of the Fifth Circuit seems to take a position in accord with the *New Bedford* case, and apparently inconsistent with that court's more recent decision in the *Warrior & Gulf case.* In *Local 12, IAM* v. *Cameron Iron Works,*

257 F. 2d 467, *cert. denied*, 358 U. S. 880 (1958), that court, speaking through Judge Rives, stated the rules governing arbitrability as follows:

> We consider the general rule to be that a dispute between labor and management is arbitrable where the dispute is specifically contracted to be arbitrable or generally where the contract expresses a broad arbitration policy, i.e., a general arbitration clause; but controversies are not arbitrable where the controversy in question is specifically excluded, where because of a listing of many arbitrable incidences the instant controversy is impliedly excluded, and where the controversy or grievance concerns violation of a 'no strike' clause. 257 F. 2d at 471.

This language seems inconsistent with the view that a grievance is not arbitrable if the court considers it frivolous or baseless. And it is noteworthy that Judge Rives dissented in *Warrior & Gulf*.

The Sixth Circuit itself, in an earlier case, seemed to take a position diametrically opposed to its holding in the present case. In *Timken Roller Bearing Co.* v. *NLRB*, 161 F. 2d 949 (6th Cir. 1947) the court ruled that a grievance concerning subcontracting was subject to the grievance procedure and arbitration, although "the practical construction put upon the management clause by both parties was, without controversy in the record, that subcontracting was a function of management." It was sufficient, the Court said, that "the dispute as it finally developed, was a dispute as to the interpretation of the management clause, and the contract specifically provided that such disputes were to be settled within the grievance procedure, and if they failed, by arbitration." 161 F. 2d at 955.

There are many other federal cases dealing with the problem presented here. Those which we have discussed, however, are sufficient to illustrate that the issue is a troublesome

one which often arises and which has been decided by the federal courts in a variety of different ways.

In *Lincoln Mills*, this Court resolved a long-standing issue of great importance—the issue of the enforceability of arbitration agreements under Section 301. The major issue which remains undecided is the one presented here—whether the federal courts, in applying *Lincoln Mills*, should order arbitration if they find, as the court of appeals here found, that the dispute is of the kind covered by the arbitration agreement, or whether they should go further, as the court here did, and examine the merits of the grievance. The importance of the issue, its bearing in every suit to compel arbitration under Section 301, and the confusion which exists in the lower federal courts, make it clear that the issue is one which should be resolved by this Court.

2. As the discussion above illustrates, the decision of the Sixth Circuit in the present case is in direct conflict with a decision of the First Circuit. The Sixth Circuit has held in the present case that a grievance may involve a dispute which falls within the scope of the arbitration provision, and yet it will not be "arbitrable" if the court, after examining the evidence as to the merits of the grievance to judge its "probative value," determines that the Union's position on the merits is baseless or frivolous. The court explicitly stated with reference to the grievance presented in this case that "a dispute exists between the parties, which, under Article IV, the appellant would be entitled to have submitted to arbitration unless barred for the reason hereinafter discussed." 265 F. 2d at 627. That reason was that the grievance was "baseless."

The First Circuit, in the *New Bedford* case, took the position that if "the grievance in question is confided to an arbitrator by the collective bargaining agreement, the Court in a § 301 proceeding has no business to concern itself with a preliminary question whether the answer to the grievance

on its merits may or may not be entirely clear under the language of the agreement." 258 F. 2d at 526. That there is a conflict between these two cases was recognized by Judge Rives in his dissent in *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 44 L.R.R.M. 2567, 2572 n. 8 (1959).

In addition, the Second Circuit has adopted an approach to the question of arbitrability which seems to be half-way between the Sixth Circuit's position and that of the First Circuit. In *Engineers Ass'n* v. *Sperry Gyroscope Co.*, 251 F. 2d 133 (2d Cir. 1957) *cert. denied*, 356 U. S. 932 (1958), the court held that the grievance there involved would be arbitrable if the union produced "some evidence which tends to establish" its claim. "Once the tendency of the evidence to support the claim has been established," the court said, "it is then the function of the arbitrator to weigh all the evidence and to then determine whether the contract was broken." 251 F. 2d at 137. In the present case, it will be remembered, the Union did present "some evidence" that Sparks was capable of returning to work. It presented the statement of Sparks' physician to that effect. That would apparently have been sufficient under the *Sperry Gyroscope* decision, but the Sixth Circuit held that the Union must not only produce some evidence, but evidence of sufficient "probative value" to persuade the court that the grievance is not baseless.

In short, the Sixth Circuit and other federal courts have applied the *Cutler-Hammer* doctrine in actions to compel arbitration under § 301, the First Circuit has rejected that doctrine, and the Second Circuit has adopted a modified version of it. This conflict between the Courts of Appeals on this important issue can be resolved only by this Court.

3. The decision of the Court of Appeals in the present case conflicts with the decision of this Court in *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957). In the present case, the court refused to compel arbitration, al-

though it recognized the fact that the grievance involved was the kind which was covered by the arbitration clause, on the ground that the union's position on the merits was "baseless." In effect, the court refused to enforce the arbitration clause and imposed a limitation on the right to compel arbitration which is nowhere mentioned in *Lincoln-Mills*, and which is completely inconsistent with the Congressional policy on which the Court based its decision in that case.

Perhaps there may be some basis for limiting the enforceability of commercial arbitration agreements in this way, but this Court has ruled that questions arising under Section 301 were to be resolved with reference to "the policy of our national labor laws." 353 U. S. at 456. The very policy on which the Court based its holding in *Lincoln Mills* requires a result opposite to that reached by the Sixth Circuit here. That is the policy favoring arbitration as a substitute for the strike, and favoring the encouragement of arbitration and no-strike agreements.

This Court quite rightly held that that policy will be furthered by compelling the parties to resolve their disputes in the manner in which they have agreed to resolve them. The policy will be hindered, however, if on the pretense of determining "arbitrability" the courts attempt to resolve controversies which the parties have agreed will be resolved by arbitration. If a union's action to compel arbitration of a grievance which is within the scope of the arbitration clause is met only by a rebuke from the court for bringing a "baseless" grievance, the attractiveness to that union of arbitration as a substitute for the strike will hardly be enhanced.

Moreover, the *Lincoln Mills* case certainly did not intend to make a potential federal question out of every industrial grievance. Yet if a court must determine whether or not a grievance is "baseless" before it compels arbitration, it will necessarily have to conduct a hearing on the merits of the

particular dispute. To require the parties to litigate the merits of a grievance twice not only would be an unwarranted burden on them, it would be a burden on the federal courts. Furthermore, most courts are not equipped to evaluate these disputes. The application of collective bargaining agreements to particular industrial situations requires a kind of expertise that few courts have. See Shulman, *Reason, Contract, and Law in Labor Relations,* 68 Harv. L. Rev. 999 (1955); Cox, *Reflections Upon Labor Arbitration,* 72 Harv. L. Rev. 1482 (1959). And even if a court's evaluation of the grievance is correct, the parties are entitled to have that judgment made in the forum they have chosen for that purpose.

Decisions such as the present one have led some students of labor relations to conclude that the institution of grievance arbitration will be hindered rather than helped by the *Lincoln Mills* decision. At a recent meeting of the National Academy of Arbitrators, one leading labor arbitrator expressed his concern as follows:

> "Each week the advance sheets bring us fresh examples of the judicial mind at work on disputes over arbitration. Typically, the issue is one of arbitrability, and the suit is usually initiated either by a union seeking to compel arbitration or by an employer attempting to prevent it. There is also a certain amount of litigation to confirm or set aside arbitration awards; but these cases do not seem to me to present a serious problem. Some of the decisions involving arbitrability, however, are based on reasoning not dreamt of in any arbitrator's philosophy. From *Cutler-Hammer* to *Warrior & Gulf Navigation Company* the story is the same: under the guise of determining arbitrability, the court disposes of the merits of the case, usually by finding the relevant language of the collective bargaining agreement so clear in meaning and so ineluctable in effect that, it would seem, only idiots and arbitrators

could profess to see in it a lurking ambiguity giving rise to an arbitrable issue." Aaron, *On First Looking into the Lincoln Mills Decision,* Arbitration and the Law—Proceedings of the Twelfth Annual Meeting National Academy of Arbitrators 1, 7-8 (1959).

It is certainly ironic that the *Lincoln Mills* decision, which was intended to promote grievance arbitration, is now being criticized in some quarters as being detrimental to the arbitration process. In our view that criticism is misdirected. It is not *Lincoln Mills* but the failure of some courts to apply *Lincoln Mills* properly which has led both to unnecessary litigation in the federal courts and to unwarranted judicial interference with the arbitrator's jurisdiction. That failure should be corrected in this case.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

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August 28, 1959.

APPENDIX A

In the

DISTRICT COURT OF THE UNITED STATES

For the Eastern District of Tennessee

Southern Division

UNITED STEELWORKERS OF AMERICA

v.

AMERICAN MANUFACTURING COMPANY

Civil Action No. 3147

This is a suit filed by a labor union seeking performance of a contract between that union, the United Steelworkers of America, and the American Manufacturing Company. It is alleged that the Company refused to arbitrate a dispute involving one James Sparks, an employee covered by the contract. See *American Lava Corp. v. Local Union No. 222, Etc.* (6th C. A.) 250 F. 2d 137.

The Company maintains that Sparks, having arranged a settlement of a workmen's compensation case against the Company providing that he is permanently partially disabled, is estopped from asserting his seniority rights as an employee; denies that Sparks is physically able to do the work required of his former job, and contends that the contract does not provide for arbitration of this type of dispute.

The contract provides, in Article II, that—"The management of the works, . . . including the right to hire, suspend, transfer, discharge, or otherwise discipline any employee for cause, such cause being . . . any other ground or reason that would tend to reduce or impair the efficiency of plant operation . . . is reserved to the Company."

The contract also provides, in Article XIV, that . . . "The Company and the Union fully recognize the principle of seniority as a factor in the selection of employees for . . .

re-employment and filling of vacancies, where ability and efficiency are equal."

The Union contends that the Company violates the above seniority provision in refusing to re-employ Sparks in his former position.

It is admitted that he left his position on account of illness which disabled him, and that he has been awarded workmen's compensation based on a twenty-five per cent partial permanent disability. This award was made in settlement of a claim made by Sparks.

This settlement was approved by the Circuit Court of Hamilton County on September 9, 1957. On September 23, 1957, a grievance was filed on behalf of James Sparks indicating that he was released on September 16, 1957, in violation of his seniority rights.

Can an employee contend, in a workmen's compensation claim, that he is at least twenty-five per cent totally disabled, and based upon that claim, accept a substantial cash settlement from his employer, and then, within a few days, force the employer to grant to him full seniority rights, or any rights as an employee?

This is not a situation where an employee has been discharged or disciplined for cause under Article III, although it approaches a discharge for reduction in the efficiency in plant operation.

This is a situation where Article XIV, Seniority, applies. The basic question is, can Sparks contend—and this means contend, not prove—that his ability and efficiency are equal to that of the other employees when he has very recently contended, in court, that he is partially permanently disabled; and the Company, relying on that contention, has settled on him a substantial sum of money to recompense him for that disability.

Res judicata is not involved. This same question has not been before any court.

Judicial estoppel may be involved. In the case of *South-*

ern Coal & Iron Co. v. Schwoon, 145 Tenn. 191, at page 226, the Supreme Court of Tennessee said: "The rule that a party will not be allowed to maintain inconsistent positions in judicial proceedings is not strictly one of estoppel, partaking rather of positive rules of procedure based on manifest justice, and to a greater or less degree on the orderliness, regularity, and expedition of litigation." The court there distinguishes between equitable and judicial estoppel, the only difference being that equitable estoppel is available only where a party is prejudiced. Since, in the case now before this Court, the Company would be prejudiced if it were required to hire, as physically unimpaired, a former employee who had received a lump sum payment for a disability the term of which coincided with the term of proposed service, it is only necessary to determine whether an estoppel, equitable or judicial, applies.

Section 67 of the third edition of Gibson's Suits in Chancery describes an estoppel in the following manner— "Whenever A, by acts, words, or silence, intentionally causes or permits B to do a thing he would not otherwise have done, it would be manifestly inequitable for A, by repudiating the very conduct by which he induced B to act, and by setting up rights of his own, inconsistent with his said conduct, to compel B to incur a loss by undoing the very thing A's conduct caused him to do." This definition clearly covers the situation now before this Court.

The defendant has filed a brief opposing the plaintiff's motion for summary judgment, and in its brief his made a motion for summary judgment on its behalf. While this informal way of submitting a motion for summary judgment is not to be encouraged, yet the Court will consider it as such.

Rule 56 (c), Federal Rules of Civil Procedure, provides that a judgment may be rendered summarily where there is no genuine issue of any material fact, and "that the moving party is entitled to a judgment as a matter of law."

The Court is of the opinion that all the facts are within the record and there is no dispute pertaining thereto. Therefore, the case is a proper one for action upon a motion for summary judgment.

For the reasons heretofore announced, the motion of the plaintiff for summary judgment is denied and the motion of the defendant for a summary judgment is granted, and there will be an order accordingly.

LESLIE R. DARR,
United States District Judge.

In the
DISTRICT COURT OF THE UNITED STATES
For the Eastern District of Tennessee
Southern Division

UNITED STEELWORKERS OF AMERICA v. AMERICAN MANUFACTURING COMPANY	Civil Action No. 3147

ORDER

This case came on to be heard on the motion of the plaintiff for Summary Judgment, and on the affidavits filed in support of and in opposition to said motion, and the pleadings and the exhibits filed; and the motion having been fully presented on hearing before the Court, and by briefs of counsel for the respective parties; and the defendant having made an informal motion for summary judgment in its behalf;

The Court being of the opinion that the case is a proper one for action upon a motion for summary judgment, and that plaintiff's such motion should be denied, but that defendant is entitled to a judgment in its favor as a matter of law, and that summary judgment should be rendered for

the defendant, now for the reasons set out in the Court's memorandum opinion, it is therefore

Ordered, Adjudged and Decreed that summary judgment be entered in favor of the defendant, American Manufacturing Company and against the plaintiff, United Steelworkers of America, and that the complaint be and it is hereby dismissed on the merits with costs.

Enter:

.....

United States District Judge.

Approved for Entry:

HAROLD M. HUMPHREYS and
STRANG, FLETCHER, CARRIGAN &
WALKER,

By JOHN CARRIGAN,
Attorneys for Defendant.

APPENDIX B

No. 13,666

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

UNITED STEELWORKERS OF AMERICA, *Appellant*, v. AMERICAN MANUFACTURING COMPANY, *Appellee*.	Appeal from the United States District Court for the Eastern District of Tennessee, Southern Division.

Decided March 19, 1959

BEFORE: ALLEN, McALLISTER and MILLER, Circuit Judges.

MILLER, Circuit Judge. This action was brought by the appellant, a labor organization, under Sec. 301 (a) of the Labor-Management Relations Act of 1947, Sec. 185 (a), Title 29, U. S. Code, to compel the appellee employer to arbitrate a grievance as provided by the provisions of a collective bargaining agreement between the parties. The District Judge denied the relief prayed for and entered summary judgment for the appellee.

The grievance, upon which arbitration was sought, arose out of the following circumstances. On or about March 29, 1957, James Sparks, an employee of the appellee and who was a plating tank operator, suffered a work-connected injury to his back. It was necessary for Sparks to discontinue his employment by reason of this injury. By virtue of proceedings under the Workmen's Compensation Act of Tennessee, Sparks obtained a compromise settlement and award under which the appellee was ordered to pay to Sparks in addition to the payment of certain hospital and

medical expenses in the total amount of $541.80, the sum of $3,006.24, which compromise award was approved by the State Court having jurisdiction of the cause on September 9, 1957. This settlement was negotiated and effected upon the representation of Sparks' attorney and the written report of Sparks' physician made on August 14, 1957, that Sparks had a permanent partial disability to his spine of about 25 per cent. The court order approving the settlement and making the award referred to the serious dispute between the parties as to the amount of temporary total disability and as to the amount of permanent partial disability suffered by Sparks, but made no finding with respect thereto.

The award was promptly paid. Some two weeks thereafter Sparks applied to be returned to his old job with the appellee, taking the position that he was fully capable of performing all of the duties involved in the job. This position was based in part upon a written and signed statement of September 16, 1957, by the same physician who made the report of August 14, 1957, reading as follows: "To Whom It May Concern: Mr. James Sparks is now able to return to his former duties without danger to himself or to others." On September 23, 1957, the appellant filed a Grievance, demanding that the appellee return Sparks to his regular job and pay him for all time lost since September 16, 1957. On October 30, 1957, appellee's attorneys wrote Sparks, sending a copy to his attorney, that his present position with regard to his capability to do the work was inconsistent with his position taken in the compensation case and requested a conference. No answer to this letter was received from Sparks or his attorney. On November 19, 1957, appellee wrote the appellant, "The Company feels at this time that the James Sparks question is not arbitrable, since a Hamilton County Circuit Court has adjudicated the matter." This action followed on December 19, 1957.

The District Judge was of the opinion that the appellee would be prejudiced if it was required to hire, as physically unimpaired, a former employee who had received a lump sum payment for a disability, the term of which coincided with the term of proposed service, and that it would be manifestly inequitable for Sparks, by repudiating the very conduct by which he induced the appellee to act, to now take a position inconsistent with such conduct and compel appellee to incur a loss. Applying the foregoing principle of estoppel he sustained appellee's motion for summary judgment.

It may be that the principle of estoppel is applicable to this case and would bar Sparks from reinstatement to his former position. But appellant contends that the District Court did not have the authority or jurisdiction to make such a ruling. The collective bargaining agreement did not confer such authority upon it. On the contrary, Article IV of that agreement providing for grievance procedure states that if a satisfactory agreement with respect to a complaint can not be reached through the procedure provided, "the same shall be submitted to arbitration for a decision as hereinafter provided, and such decision shall be final and binding on both parties." If the grievance is an arbitrable one under the provisions of the collective bargaining agreement, appellant has the right to have this issue, including appellee's defense of estoppel, decided by the arbitrators instead of by the Court. *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U. S. 448; *Local 19, Warehouse, etc.*, v. *Buckeye Cotton Oil Co.*, 236 F. (2) 776, C. A. 6th.

We recognize that under the ruling of this Court the question of whether an issue is an arbitrable one under the collective bargaining agreement is a question of law for determination by the Court. *International Union, etc.*, v. *Benton Harbor Malleable Industries*, 242 F. (2) 536, 539-540, C. A. 6th, cert. denied, 355 U. S. 814; *Local No. 149,*

etc., v. *General Electric Co.*, 250 F. (2) 922, C. A. 1st, cert. denied, 356 U. S. 938. In *American Lava Corporation* v. *Local Union No. 222, etc.*, 250 F. (2) 137, C. A. 6th, we held the grievance there involved to be arbitrable and required the employer to arbitrate. We did not, however, attempt to adjudicate the grievance on its merits.

Nor do we think that arbitration could be denied as a matter of law on the ground relied upon by the appellee, namely, that the issue involved had previously been adjudicated by the Hamilton County Circuit Court. Contrary to appellee's contention, there has been no adjudication that Sparks was 25 per cent permanently disabled. The State Court judgment in the Workmen's Compensation proceeding referred to the dispute existing between the parties with respect to the injuries and approved a compromise settlement without making a finding on the extent of the injuries. The question of estoppel may be involved but the nature and extent of Sparks' injuries were not judicially determined.

However, it is settled law that the judgment of the trial court should be affirmed if the appellate court is of the opinion that it is correct, even though for reasons different from those relied upon by the trial judge. *Helvering* v. *Gowran*, 302 U. S. 238, 245; *J. E. Riley Investment Co.* v. *Commissioner*, 311 U. S. 55, 59. If the grievance was not an arbitrable one as a matter of law, the judgment dismissing the action must be affirmed. *International Union, etc.*, v. *Benton Harbor Malleable Industries*, supra, 242 F. (2) 536, C. A. 6th, cert. denied, 355 U. S. 814. Accordingly, we consider that question.

Article XIV of the collective bargaining agreement states that the company and the Union fully recognize the principle of seniority as a factor in reemployment and filling of vacancies "where ability and efficiency are equal."

Article II provides, "If any discharged * * * employee contends that he was not guilty of the cause given, he

may question his discharge by filing written protest within three (3) working days from the date of his discharge * * *. Should the parties fail to agree the arbitration clause may be invoked."

Article IV provides the Grievance Procedure and Arbitration. It states, "If any employee * * * shall have any grievance as to the meaning, application, operation of any provision of the agreement, the same shall be promptly submitted by such employee * * * to the Foreman of the Department in which the grievance arises." After providing for further processing of the grievance at different levels, it provides that if a satisfactory agreement on the complaint can not be reached, "the same shall be submitted to arbitration for a decision as hereinafter provided, and such decision shall be final and binding on both parties." Another paragraph of Article IV provides, "Any disputes, misunderstandings, differences or grievances arising between the parties as to the meaning, interpretation and application of the provisions of this agreement, which are not adjusted as herein provided, may be submitted to the Board of Arbitration for decision."

Appellant contends that the refusal of the appellee to restore Sparks to his former position in accordance with his seniority rights is in effect a discharge for cause, which may be challenged by the employee under Article II. Appellee contends that under Article XIV Sparks' right to reemployment by reason of seniority is conditional upon his ability and efficiency being equal to that of other employees, and that by reason of his permanent, partial disability his ability and efficiency is not equal to that of other employees and that he is not physically able to perform the duties of the job. Appellant's reply to this is that Sparks' ability and efficiency is a factual issue about which the parties disagree. We are of the opinion that a dispute or difference exists between the parties, which, under Article IV, the appellant would be entitled to have submitted

to arbitration, unless barred for the reason hereinafter discussed.

In *International Union, etc.*, v. *Benton Harbor Malleable Industries*, supra, 242 F. (2) 536, 540, C. A. 6th, cert. denied, 355 U. S. 814, we indicated, without deciding that a frivolous, patently baseless claim is not sufficient to raise an arbitrable issue. In *Local No. 205, etc.*, v. *General Electric Co.*, 233 F. (2) 85, 401, C. A. 1st, affirmed, 353 U. S. 547, the Court expressed the same view. There is other authority to this effect. *Annotation*, 24 A. L. R. (2) 762, 764. See also: *Engineers Association* v. *Sperry Gyroscope Co., etc.*, 251 F. (2) 133, 136-137, C. A. 2nd. We believe that such a rule is applicable to this case.

In his petition, in the Workmen's Compensation suit, filed May 10, 1957, and amended June 4, 1957, Sparks alleged that his usual employment required him to lift heavy objects from a rack about waist high over his head and in order to do so was required to get in an awkward or strained position, that during the last part of January or the first part of February, 1956, while engaged in his usual employment, he suffered a ruptured intervertebral disc for which he received treatment at Campbell Clinic in Chattanooga, Tennessee, on sixty-six different days since February 6, 1956; that on or about March 29, 1957, while performing essentially the same type of work and again lifting a large frame, he again injured or reinjured his back and aggravated the condition above referred to, and since that date he had no longer been able to perform his duties.

On August 14, 1957, Sparks' personal physician who had performed an operation on Sparks advised that Sparks could not lift over thirty pounds of weight and made a written report in which he stated that he believed Sparks would have permanent disability as far as his lumbar spine was concerned by reason of having had a herniated disc which necessitated surgery, and "I believe his disability was 55 or 60 per cent before surgery and I believe it is

approximately 25 per cent at the present time. I also believe that his partial permanent disability will remain at about 25 per cent."

On August 28, 1957, Dr. Shelton examined Sparks for the appellee and reported that he estimated his permanent partial disability to be 25 per cent for the body as a whole for his particular type of work. On November 14, 1957, Dr. Shelton again examined Sparks and made a detailed report in writing to the appellee which concluded with the statement, "I see no reason to change my opinion as stated on the examination of August 28, 1957. * * * I see no change in the physical findings, so I see no reason to change my opinion as expressed on that examination. It is my opinion that he should not be placed on work requiring heavy lifting, or prolonged stooping or bending." An affidavit by the Plant Manager of the appellee stated that the appellee did not have any light jobs and that it had no work to provide Sparks where he would not be required to bend and stoop and lift, or where he would not at times have to lift weights totaling more than thirty pounds. This was supported by photographs taken in the normal course of operations, showing the plating department where Sparks worked, typical work procedure necessary for men in the plating department and the heavy nature of part of the work required.

It will be noticed that the September 16, 1957, statement of Sparks' physician that "Mr. James Sparks is now able to return to his former duties without danger to himself or to others," makes no specific findings resulting from an examination subsequent to August 14, 1957, does not attempt to explain why the 25 per cent permanent disability existing on August 14, 1957, no longer existed, and in fact does not state that the 25 per cent permanent disability does not still exist. The statement that Sparks could return to work "without danger to himself or to others" falls far short of saying that he could return to his former

position with "ability and efficiency" equal to that of other employees, which is necessary in order for him to claim his seniority rights under Article XIV. In fact, considered in the light of the allegations of the complaint as amended in the Workmen's Compensation case, the kind of work Sparks would be required to do, and the findings in the three physical examinations made of Sparks during the preceding thirty-three days, it is so lacking in probative value with respect to the issue in this case as to compel the conclusion that the so-called claim or grievance is a frivolous, patently baseless one, not subject to arbitration under the collective bargaining agreement between the parties.

The judgment of the District Court is affirmed.

JUDGMENT

Appeal from the United States District Court for the Eastern District of Tennessee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

ORDER DENYING REHEARING

Appellant's petition for rehearing having been considered by the Court,

IT IS ORDERED that said petition be denied.

FILE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1959.

No. 360.

UNITED STEELWORKERS OF AMERICA,

Petitioner,

vs.

AMERICAN MANUFACTURING COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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TABLE OF CONTENTS.

TABLE OF CASES.

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ON PETITION FOR WRIT OF CERTIORARI
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FOR THE SIXTH CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

(A) QUESTION PRESENTED FOR REVIEW.

Where the Union acting for a Company's former employee brings an action under Section 301 of the Labor Management Relations Act to compel arbitration of an alleged grievance, and the question is submitted to the District Court by motion for summary judgment, can the Union properly call on this Court to review the matter because of the dismissal of the action as not subject to arbitration, affirmed by the Court of Appeals on the grounds that the alleged grievance was frivolous and patently baseless?

(B) STATEMENT OF THE CASE.

This controversy stems from the action of an employee in obtaining Workmen's Compensation benefits for permanent disability and then seeking seniority employment benefits on the basis that he was not disabled.

Petitioner, United Steelworkers of America (hereinafter called the Union), brought the original action in the United States District Court in Chattanooga, Tennessee, against American Manufacturing Company (hereinafter called the Company). The suit was on behalf of James D. Sparks, a member of the Union, seeking to compel arbitration of an alleged grievance against the Company. Subsequent to the filing of the answer to the complaint, the Union filed a Motion for Summary Judgment asking that the Court decide the questions presented "as a matter of law." (R. 45a.) That portion of the record which was taken from the appendices to the Briefs filed by the parties in the Court of Appeals is paginated in the manner in which the appendices were paginated: pages taken from the Appellant's appendix being numbered 1a to 61a, and pages from the Appellee's appendix being numbered 1b to 29b. Various affidavits and exhibits were filed, and the Respondent, as defendant in the proceeding, in connection with its Brief moved the Court for Summary Judgment in its behalf, there stating in writing: "Defendant requests Summary Judgment in its behalf." (R. 21b.) The Union member, James Sparks, had obtained a Workmen's Compensation award from the Circuit Court of Hamilton County, Tennessee, and a payment of something more than Three Thousand ($3,000) Dollars for permanent disability by reason of accidental injury arising out of and in the course of his employment. In his petition in that Court proceeding by which he obtained that award, Sparks alleged that his "usual employment (R. 32a) included the type of work of lifting large and heavy frames and required him to get in awkward or strained positions." (R. 37a.) In bringing about that settlement and in obtaining the Court order, James Sparks, through his attorney, submitted the signed statement of Dr. Warren Kimsey, dated August 14, 1957 (R.

17b), in which Dr. Kimsey stated: "I believe his disability was 55% or 60% before surgery and I believe it is approximately 25% at the present time. I also believe that his partial permanent disability will remain at about 25%." (R. 19b.)

On August 14, 1957, Dr. Kimsey had also advised Mr. Alexander, the Company's plant superintendent, that Sparks "cannot lift over 30 pounds of weight." (R. 3b.)

In the Workmen's Compensation suit, James Sparks was represented by the same Chattanooga attorneys (R. 33a) who as local counsel appeared as attorneys for the complainant in this present suit as originally filed in the United States District Court in Chattanooga. (R. 24a.)

On September 9, 1957, the Court award of compensation for permanent disability of the body as a whole was approved (R. 44a), this being an adjudication by that Court in a lump sum based on twenty-five (25%) percent permanent disability. (R. 43a; R. 18b.)

One week later, on September 16, 1957, Sparks sought to return to work at his regular job (R. 23a). He or someone for him had obtained from Dr. Kimsey a "To Whom it May Concern statement" that "Mr. James Sparks is now able to return to his former duties without danger to himself or to others." (R. 53a.) The next week the Union filed a grievance report alleging violation of seniority provisions "by not allowing James Sparks to return to work at his regular job * * * since his release on September 16, 1957." (R. 23a.)

Subsequently, the attorney who had represented the Company in the Workmen's Compensation proceeding, after learning that Mr. Sparks had asked to be returned to his regular job, wrote to Mr. Sparks with a copy to his attorney. In that letter he requested a conference inasmuch as Sparks' claim of capability to do the work was

inconsistent with his position taken shortly before in the compensation case that he was permanently disabled. (R. 18b).

On November 14, 1957, Dr. George W. Shelton (examining by consent of both parties) found no change in the twenty-five (25%) percent permanent disability of the body as a whole, and stated "it is my opinion that he should not be placed on work requiring heavy lifting or prolonged stooping or bending." (R. 16b).

The Company's business is comparatively small. It has no work to provide Sparks where he will not be required to bend and stoop and lift and where he will not at times have to lift weights totaling more than thirty pounds. (R. 5b.) In part, because of the peculiar nature of its operations, and in order to protect and safeguard the individual employee and also his fellow employees from the hazards involved in working over and about vats and tanks containing acids and chemicals (R. 5b and 9b-11b), it had been agreed as a part of the Collective Bargaining Agreement that the management of the works and the hiring and discharge of employees was "reserved to the Company." (R. 7a.) In that provision (Article II of the Agreement) the mutual emphasis on protection of fellow employees and the efficiency of the plant operation is apparent.

The Seniority Article (R. 13a) on which the Union based its grievance and suit, recognizes the principle that it will apply "where ability and efficiency are equal." (R. 13a.)

The Honorable Leslie R. Darr as the United States District Judge hearing the matter, found "that all the facts are within the record and there is no dispute pertaining thereto. Therefore, the case is a proper one for action under the Motion for Summary Judgment." (R. 57a.)

Both the Union and the Company having moved for Summary Judgments, the District Court found that the Union had failed to make out a case requiring the Court to compel arbitration. (R. 57a.) The Court of Appeals has arrived at the same conclusion by a somewhat different path, but reaching the same result to the effect that the "so-called claim or grievance is a frivolous, patently baseless one, not subject to arbitration under the Collective Bargaining Agreement between the parties." (Part of next to the last sentence of the Opinion of the Court of Appeals, *United Steelworkers of America v. American Manufacturing Co.*, 264 F. 2d, 624 at 628.)

(C) REASONS WHY THE WRIT SHOULD BE DENIED.

I. THE SIXTH CIRCUIT DECISION IS NOT IN CONFLICT WITH THOSE OF OTHER CIRCUITS.

The Union seeks specific performance of the Arbitration Clause of the Collective Bargaining Agreement as to a matter which has been found both by the District Court and by the Court of Appeals to be patently baseless. It is true that the Court of Appeals in affirming did not fully follow the lower Court's reasoning; but both Courts found that the Union's claim was baseless.

Both the District Court and the Court of Appeals found that the complaint should be dismissed.

The Union now contends that this decision on the part of the Sixth Circuit is in direct conflict with the decision of the First Circuit in *New Bedford Defense Products Division v. Local No. 1113 U. A. W.*, 258 F. 2d 522 (1st Cir. 1958). However, the decision of the Sixth Circuit is directly in accord with the said First Circuit's holdings. In the *New Bedford* case Judge Magruder, in the course of the opinion, specifically refers to, and in effect

incorporates the reasoning of the earlier decision of that same Circuit (*Local 205, etc. v. General Electric Company* (1st Cir. 1956) 233 F. 2d 85) in which he had written the earlier opinion. Referring to this earlier case that Court said in effect that the *New Bedford* decision was not intended to be contrary to the earlier decision. 258 F. 2d at 526, 527. In that earlier case the same Court in an Opinion written by the same Judge specifically stated that even where the contract in suit puts the matter of arbitrability into the hands of the arbitrator, the Court can give an order requiring arbitration only if "the applicant's claim of arbitrability is not frivolous or patently baseless." 233 F. 2d at 101. It is, therefore, of more than minor significance that these are exactly the same words used by the Court of Appeals in this present case, in which the Sixth Circuit held that the so-called claim or grievance is a frivolous, patently baseless one, not subject to arbitration under the Collective Bargaining Agreement between the parties. 264 F. 2d at 628.

Therefore, it appears that the decision in this case does not actually conflict with the decisions of the Courts of other Circuits, and that this is not a case of conflict between Circuit Courts of Appeal. Certiorari is not suggested by any of the standards formulated by this Court and its Rules relating to Writs of Certiorari.

II. THIS CASE PRESENTS NO UNSETTLED QUESTION OF FEDERAL LAW.

This particular case does not present any unsettled questions of Federal law. The Union simply brought an action demanding that the District Court use its extraordinary powers to compel arbitration of an unjust, frivolous and patently baseless alleged grievance. Under the disclosures pursuant to the Summary Judgment pro-

cedure, first invoked by the complainant and then by the defendant, the true nature of the complaint was disclosed and the Court properly dismissed the action. In *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U. S. 448, in the opinion of the Court written by Mr. Justice Douglas, the Court referred to the legislative history of Section 301, and quoted from the statement in the Conference Report that: "The enforcement of that contract should be left to the usual processes of the law * * *." (353 U. S. at p. 452.) Likewise, in the concurring opinion of Mr. Justice Burton and Mr. Justice Harlan, Mr. Justice Burton said: "The power to decree specific performance of a collectively bargained agreement to arbitrate finds its source in Section 301 itself, and in a Federal District Court's inherent equitable powers, nurtured by a congressional policy to encourage and enforce labor arbitration in industries affecting commerce." 353 U. S. at p. 460.

In the present case the usual processes of the law were followed. Surely neither the Union nor management would have the Courts attach unusual modifications of the Summary Judgment procedures to apply only to cases arising under Section 301, to compel arbitration. The fact is that the Union itself first invoked the Summary Judgment procedure in this case, and it should not now complain that, upon its being invoked by the defendant, the District Court dismissed the action upon the Union's failure to make out a case upon which relief could be granted.

It has long been and we believe still is the Federal Rule of Law as stated in the first headnote of *Ohio v. Helvering*, 292 U. S. 360, that the question of the Court's power to grant injunctive relief need not be considered where the case is not one in which the complainant is entitled to such relief.

III. THE DECISION BELOW IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT.

We respectfully submit that the decision of the Court of Appeals in the present case does not conflict with the decision of this Court in the *Lincoln Mills* case. That case did not establish any right to the abuse of our National Labor Laws. The decision of the Court of Appeals and of the District Court in the present case is not in any way adverse to "the policy of our National Labor Laws."

The power given to the Court to compel arbitration is in the nature of affirmative injunctive relief. It is a drastic right, which under our American system, must be used with judicial wisdom.

It was not the intent or purpose of the Court in the *Lincoln Mills* case, or in any other case, to establish a rule that the Court must blindly compel the parties to submit to arbitration in every complaint filed in the Court demanding such action. If no legal restraint were possible, a ruthless or belligerent leader, whether representing management or labor, could easily abuse the right and subject an adverse party to unjust publicity and substantial and unnecessary expense. By simply claiming or feigning a grievance and bringing an action in the District Court, an unscrupulous party could obtain publicity entirely unfair to the adversary, and under a ruling such as the Union here contends for, could compel submission to considerable inconvenience and to possible great loss in time of witnesses and expense of arbitration.

Such is not our American way. An important foundation stone of our judicial system is that which not only gives the Court the right to consider, but requires the Court to consider every case. Especially is this important with respect to an action seeking action in the nature of an injunction. It must be both the privilege and the obli-

gation of the Court to determine whether there is a reasonable cause or base for the action and for the relief sought.

The Union cites and quotes from a number of District Court and other cases. However, these must be considered in the light of the record in, and decision of, the Court of Appeals in the present case. The action here was one of those inequitable and baseless proceedings which should never have been brought. The Court of Appeals correctly affirmed the action of the District Court in dismissing the action. Under these circumstances, the cases cited and quoted from by the Union fail to support the Union and do not represent any entrenched rule of law. They do not conflict with the judgment here under review. The case meets none of the tests which this Court customarily applies to determine whether certiorari will be granted.

Respondent submits that there is no reason to grant the petition and that it should be denied.

Respectfully submitted,

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October 20, 1959.

FILL COP

Nos. 360, 443 and 538

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 360

UNITED STEELWORKERS OF AMERICA, *Petitioner*,

v.

AMERICAN MANUFACTURING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 443

UNITED STEELWORKERS OF AMERICA, *Petitioner*,

v.

WARRIOR & GULF NAVIGATION COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 538

UNITED STEELWORKERS OF AMERICA, *Petitioner*,

v.

ENTERPRISE WHEEL & CAR CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

In No. 360, the *American Manufacturing Company* case, the opinion of the District Court for the Eastern District of Tennessee (Am.R. 39)[1] is unreported. The opinion of the Court of Appeals for the Sixth Circuit (Am.R. 64) is reported at 264 F. 2d 624.

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[1] References to the record in No. 360 will be indicated by the letters "Am.R." followed by the page number in the record printed by the Clerk of this Court.

In No. 443, the *Warrior & Gulf* case, the Findings of Fact and Conclusions of Law of the District Court for the Southern District of Alabama (War.R. 102-107)[2] are reported at 168 F. Supp. 702. The opinion of the Court of Appeals for the Fifth Circuit (War.R. 109) is reported at 269 F. 2d 633.

In No. 538, the *Enterprise* case, the final opinion of the District Court for the Southern District of West Virginia (Ent.R. 1a-3)[3] is reported at 168 F. Supp. 308. The opinion of the Court of Appeals for the Fourth Circuit (Ent.R. 41) as modified (Ent.R. 50) is reported at 269 F. 2d 327.

JURISDICTION

In No. 360, the judgment of the Court of Appeals for the Sixth Circuit (Am.R. 64) was entered on March 19, 1959. A petition for rehearing was denied on April 10, 1959 (Am.R. 71). On June 4, 1959, Mr. Justice Stewart extended the time for filing a petition for certiorari to and including August 28, 1959 (Am.R. 71). The petition was filed on August 28, 1959 and granted on November 9, 1959. This Court's jurisdiction rests on 28 U. S C. § 1254(1).

In No. 443, the judgment of the Court of Appeals for the Fifth Circuit was entered on July 30, 1959 (War.R. 120).

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[2] References to the record in No. 443 will be indicated by the letters "War.R." followed by the page number in the record printed by the Clerk of this Court.

[3] References to the record in No. 538 will be preceded by the letters "Ent.R." The record here is composed of the appendices to the briefs in the court below, plus the proceedings in the court below, and is not consecutively paginated. Page references to the portion of the record in that case contained in the appendix to the appellant's brief below, which appears first in the record, will therefore be indicated by the number 1a plus the page number (e.g., Ent.R. 1a-1, Ent.R. 1a-2, etc.). Page references to the appendix to the appellee's brief will be indicated by the number 2a plus the page number (e.g., Ent.R. 2a-1, Ent.R. 2a-2, etc.). Page references to the proceedings of the court below will simply refer to the number of the page as it appears in the printed record, without any numbered prefix (e.g., Ent.R. 41, Ent.R. 42, etc.).

The petition for certiorari was filed on September 30, 1959 and granted on December 7, 1959. This Court's jurisdiction rests on 28 U. S. C. § 1254(1).

In No. 538, the judgment of the Court of Appeals for the Fourth Circuit was entered on June 16, 1959. (Ent.R. 48). On August 24, 1959, the Court modified its opinion (Ent.R. 50) and denied a petition for rehearing (Ent.R. 51). The petition for certiorari was filed on November 23, 1959 and granted on January 11, 1960. This Court's jurisdiction rests on 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. In an action under Section 301(a) of the Labor-Management Relations Act to compel arbitration pursuant to a collective bargaining agreement containing a no-strike clause and a broad provision requiring arbitration of all grievances involving the interpretation and application of the agreement:

   (a) Is it proper for the court as a condition for ordering arbitration, to examine the merits of the grievance sought to be arbitrated and to require the moving party to demonstrate that the grievance is not "baseless" or "insubstantial"?

   (b) Is it proper for the court as a condition for ordering arbitration to construe the substantive provisions of the agreement and to require the moving party to demonstrate that the management action complained of could be deemed to violate some provision of the agreement?

2. Does a provision stating that "issues which conflict with any Federal statute in its application as established by court procedure or matters which are strictly a function of management shall not be subject to arbitration" require a court to determine, as a condition to ordering arbitration of a grievance based on provisions of the agreement other than the management clause, whether the company, in per-

forming its management functions, has violated those other provisions?

3. If a court should make the determinations set forth above as a condition to ordering arbitration:

(a) was the court below in No. 360 correct in holding the grievance to be "baseless"?

(b) was the court below in No. 443 correct in determining from the evidence that no grievance protesting the contracting out of work covered by the particular agreement could possibly be arbitrable and that the union's grievance was "insubstantial"?

4. After arbitration has taken place and a court is asked under Section 301 to enforce an arbitrator's award requiring an employer to reinstate, after the expiration date of the collective agreement, employees found to have been wrongfully discharged during its term:

(a) Is the arbitrator's determination as to whether the remedy provided by the agreement was intended to survive its expiration to be treated as a determination of a question of interpretation and application of the agreement or, to the contrary, is such a determination one of law to be decided by the court?

(b) If the question of remedy is one of interpretation and application of the agreement, may the federal courts properly, under § 301, review *de novo* the arbitrator's determinations with respect to that question?

(c) If such review is proper, should the provisions of the agreement here requiring the reinstatement of wrongfully discharged employees be construed as being applicable only to cases decided prior to the expiration date of the agreement?

(d) If the question of remedy is one of law, as the court below assumed, rather than one of interpretation of the remedial provisions of the agreement, was the court correct

in holding that an arbitrator may not, as a matter of law, prescribe restoration of the status quo after the agreement has expired as a remedy for a violation which took place during its term?

STATUTE INVOLVED

Section 301(a) of the Labor-Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C. §185, provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT

A. Introduction

These are three separate cases, which come to this Court from three different circuits, and which involve three distinct sets of facts. They all involve, however, questions relating to the enforcement of arbitration agreements under Section 301 of the Taft-Hartley Act, 29 U.S.C. §185 and have been set down by this Court for consecutive argument. We will therefore treat all three cases in one combined brief.

In each of these three cases the same basic elements appear. Each involves a "grievance" which arose during the term of a collective bargaining agreement between a labor union, the United Steelworkers of America, and an employer. The agreement in each case prohibited strikes during its term, (Am.R. 13; War.R. 6, 15; Ent.R. 6-7, 18[4]) and

[4] No express prohibition of strikes appears in the record in the *Enterprise* case. It is clear, however, that the parties treated the agreement as prohibiting the employees from striking. Indeed, the very grievances involved here protested against the discharges of

provided a procedure in lieu of strikes for resolving grievances. This procedure involved the usual series of conferences at ascending levels of authority between the union and the company, and included in each case the ultimate right to appeal to an impartial arbitrator if the grievance were not settled by agreement in those conferences. Each agreement, in varying but similar language, granted to the arbitrator jurisdiction to determine questions of interpretation and application of the collective bargaining agreement arising during its term.

In all three cases, the company refused to arbitrate, and the union was forced to bring an action in a federal district court under Section 301 seeking an order compelling arbitration. In No. 538, the *Enterprise* case, such an order was granted, an arbitration was held, and an award favorable to the union was rendered, but the company refused to comply with the award. On the union's motion, the district court ordered compliance with the award. On appeal, however, the Fourth Circuit held that the award was only valid in part, and therefore enforceable only in part. That case comes to this Court, therefore, on the question of the extent to which a federal court should review a question which the parties have entrusted to an arbitrator and which he has decided.

In the other two cases, Nos. 360 and 443, the district courts and the courts of appeals refused to compel arbitration, holding that the grievances involved were not arbitrable under the respective collective bargaining agreements under which each arose, in *American Manufacturing,* because the court considered the grievance "baseless," and in *Warrior and Gulf* because the court considered the subject of the grievance "strictly a function of management." Thus these two cases come to this Court on the question of

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employees for striking during the contract term, action which the company contended, and the arbitrator found, was in violation of the agreement and a proper cause for discipline (Ent.R. 2a-18, 2a-22).

the extent, if any, to which a federal court should, before ordering arbitration, enter into an examination of the substantive issues which the parties have entrusted to the arbitrator before he has an opportunity to decide them.

The three cases together, along with *Local 1912, IAM* v. *United States Potash Co.*, 270 F. 2d 496 (10th Cir. 1959) and *Brass & Copper Workers* v. *American Brass Co.*, 45 L.R.R.M. 2379 (7th Cir. 1959), now pending in this Court on petitions for certiorari (Nos. 554 and 706, respectively), present for decision by this Court varying aspects of the basic issue as to the relative roles of the courts and arbitrators in suits arising under Section 301.

B. The American Manufacturing Case No. 360

The grievance in this case involved an employee covered by the agreement, James B. Sparks, who had been off the job due to an injury suffered in the plant. While off work, he brought an action in a state court for workmen's compensation benefits (Am.R. 26). At that time, Sparks' physician expressed the opinion that the injury had resulted in a permanent partial disability of 25% (Am.R. 53). The extent of permanent partial disability, if any, was an issue in that case, and was left unresolved when the claim was settled (Am.R. 30).

Thereafter, Sparks applied for reinstatement to his job. He submitted a statement from his physician certifying that "Mr. James Sparks is now able to return to his former duties without danger to himself or to others." (Am.R. 39). The Company refused to reinstate him. On September 23, 1957, the union filed a grievance (Am.R. 20) asserting that Sparks was entitled to return to his job by virtue of Article XIV, Seniority, of the collective bargaining agreement.

No settlement was reached, and on October 21, 1957, the union invoked the arbitration provision of the agreement (Am.R. 7-8) which provided:

> "Any disputes, misunderstandings, differences or grievances arising between the parties as to the mean-

ing, interpretation and application of the provisions of this agreement, which are not adjusted as herein provided, may be submitted to the Board of Arbitration for decision."

In accordance with the procedure prescribed in the agreement for choosing a Board of Arbitration, the union submitted the name of the person whom it selected to sit on the Board. The company's attorney made no objection to arbitration and, on the next day, submitted the name of the Company's representative of the Board (Am.R. 33). The union then submitted to the company a list of names of possible impartial members of the Board (Am.R. 36-37).

On October 29, the company requested a delay in the selection of the impartial member of the Board in order to enable its own doctor to re-examine Sparks (Am.R. 34). The examination was held. On November 14, the company's doctor reported that in his view Sparks "should not be placed on work requiring heavy lifting, or prolonged stooping or bending" (Am.R. 45). "Under these circumstances," the company then "declined to submit the matter to arbitration" (Am.R. 45) and informed the union that it considered the grievance not arbitrable, "since a Hamilton County Circuit Court has adjudicated the matter" (Am.R. 35).

The union then filed the present action to compel arbitration in the United States District Court for the Eastern District of Tennessee. After the company filed its answer (Am.R. 20), the union moved for summary judgment (Am.R. 32). The case was argued and submitted on the basis of the pleadings and affidavits filed by the parties.

The company contended that it was not obligated to arbitrate the issue of Sparks' right to reinstatement because Sparks' attorney and physician had asserted in connection with the workmen's compensation proceeding that Sparks was 25% permanently disabled. The company also raised

as a defense the fact that a settlement decree had been entered in that case, although the decree itself stated that "there is a serious dispute between the parties as to the amount of temporary total disability suffered by the complainant and also as to the amount of permanent partial disability sustained by the complainant" (Am.R. 31).

The union, while disputing the company's arguments based on the workmen's compensation proceeding, urged that these arguments related only to the merits of the grievance and should thus be made before the Board of Arbitration, since under the agreement that Board had jurisdiction over "any disputes, misunderstandings, differences or grievances . . . as to the meaning, interpretation, and application of the provisions of this agreement..." (Am.R. 7). The question before the court, the union urged, was simply whether there was an unresolved dispute involving the application of Article XIV of the agreement in the Sparks case.

The district court and the Court of Appeals for the Sixth Circuit each upheld the company. The district court granted summary judgment for the company on the ground that the union was estopped from asserting that Sparks was equal in "efficiency and ability" to other employees because of his contrary position in the earlier workmen's compensation proceedings (Am.R. 39-42). The court of appeals affirmed, although it expressly disagreed with the lower court's reasoning.

The opinion of the court of appeals began by rejecting the estoppel theory on which the district court had based its decision, stating that "if the grievance is an arbitrable one under the agreement, appellant has the right to have this issue, including appellee's defense of estoppel, decided by the arbitrators instead of by the Court." (Am.R. 66). The court then dismissed the company's contention that the issue raised by the grievance had been settled by the consent judgment in the workmen's compensation case, pointing

out that "the nature and extent of Sparks' injuries were not judicially determined" (Am.R. 67).

Having disposed of those preliminary issues, the court turned to an examination of the applicable provisions of the collective agreement, and concluded that the dispute between the parties concerned the proper application of the seniority Article in Sparks' case, and was therefore a dispute which "the appellant would be entitled to have submitted to arbitration, unless barred for the reason hereinafter discussed" (Am.R. 68).

At this point, the court examined the evidence concerning Sparks' physical condition and the kind of work which is performed in the company's plant. It considered the allegations in Sparks' workmen's compensation complaint as to the nature of the work he had performed and the nature of his injury, it reviewed the various medical reports which both the company's and Sparks' doctors had made at various times concerning Sparks' condition, and it cited the affidavit of the Plant Manager which described the work which Sparks would do if he were reinstated and which was accompanied by photographs showing work procedure in the plant. Against this evidence it weighed the statement of Sparks' doctor that Sparks was able to return to work, and concluded that

> "in the light of the allegations of the complaint as amended in the Workmen's Compensation case, the kind of work Sparks would be required to do, and the findings in the three physical examinations made of Sparks in the preceding thirty-three days, it is so lacking in probative value with respect to the issue in this case as to compel the conclusion that the so-called claim or grievance is a frivolous, patently baseless one, not subject to arbitration under the collective bargaining agreement between the parties." (Am.R. 70)

The court did not hold that under the agreement the union could never compel arbitration of a claim that an em-

ployee, laid off due to injury, was sufficiently recovered to be entitled to reinstatement. Rather, it held that an issue which would otherwise be arbitrable will be rendered not arbitrable if the court, after examining the evidence relevant to the determination of that issue on its merits, decides that the evidence is so overwhelmingly in favor of the company's position that the union's claim is "baseless."

C. The Warrior & Gulf Case No. 443

The grievance in this case alleged that the company had violated the collective bargaining agreement by its course of action in laying off employees in the bargaining unit while contracting their work out to other employers (War.R. 104). The company, whose business is to transport steel and steel products by barge, maintains a terminal at Chicasaw, Alabama at which it performs certain maintenance and repair work on its barges. The employees at that terminal constitute the bargaining unit covered by the collective bargaining agreement in this case. Between March of 1956 and December of 1958, the company almost halved the bargaining unit from 42 to 23 men by greatly increasing the amount of maintenance work (which these employees could perform and had performed in the past) contracted to other companies (War.R. 60). The contracting companies used Warrior & Gulf supervisors to lay out the Warrior & Gulf work (War.R. 36-37, 41-42); hired some of the laid-off Warrior & Gulf employees for less than the rate called for in the Warrior & Gulf contract with the union (War.R. 37); and, indeed, assigned some of the laid-off Warrior & Gulf employees to the Warrior & Gulf work in their yards (War.R. 36, 41-42). It was the theory of the union that this action constituted a partial lockout (War.R. 104) and a violation of the seniority provisions of the agreement (War.R. 2, 47), as well as a violation of the provision specifying the wages to be paid for this work (War.R. 53).

The grievance procedure of the agreement provided in pertinent part as follows:

> "Issues which conflict with any Federal statute in its application as established by Court procedure or matters which are strictly a function of management shall not be subject to arbitration under this section.
>
> "Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise, there shall be no suspension of work on account of such differences, but an earnest effort shall be made to settle such differences immediately in the following manner:
>
> "A. For Maintenance Employees:
>
> "First, between the aggrieved employees, and the Foreman involved:
>
> * * * *
>
> "Fifth, if agreement has not been reached the matter shall be referred to an impartial umpire for decision. The parties shall meet to decide on an umpire acceptable to both. If no agreement on selection of an umpire is reached, the parties shall jointly petition the United States Counciliation Service for suggestion of a list of umpires from which selection will be made. The decision of the umpire shall be final. The expense and salary incident to the services of the umpire shall be paid jointly by the Company and the Union." (War.R. 15-16).

When the union was unable to obtain a satisfactory settlement of the grievance in the preliminary steps of the grievance procedure, it requested that the matter be submitted to arbitration. Warrior & Gulf refused. The union then filed suit in the United States District Court for the Southern District of Alabama under Section 301 to compel the company to arbitrate the grievance.

The union filed a motion for preliminary injunction (War.R. 22), and the defendant filed a motion to dismiss for failure to state a claim (War.R. 24) and an answer (War.R. 29). When the motion for preliminary injunction came on for hearing all parties agreed to dispose of the entire matter at that hearing (War.R. 32).

The district court overruled the union's motion to strike the defenses, stated in the company's answer, which went to the merits of the grievance, rather than its arbitrability (War.R. 33). After hearing the evidence, substantially all of which in fact went to the merits of the grievance, the district court made findings of fact and conclusions of law, granted Warrior & Gulf's motion to dismiss the complaint, and denied the union's motion for a preliminary and permanent injunction (War.R. 101-07). The district court found as a fact that the union had not shown that the company "engaged in any conduct which has violated any of the provisions of the present labor contract." (War.R. 106). It concluded as a matter of law, in substance, that the union's grievance lacked merit because "the labor contract does not prohibit, and is not susceptible of being interpreted to require that defendant is prohibited from contracting out work," and "the right to contract out work is an inherent, traditional right of management which may not be questioned or subjected to arbitration" (War.R. 107).

The Court of Appeals for the Fifth Circuit affirmed, Judge Rives dissenting. The majority first noted that the agreement withdrew from the section dealing with grievances any matters "which are strictly a function of management." Interpreting the agreement before it, the majority then concluded that the grievance concerned a subject which was strictly a "matter of management" because the agreement did not limit the power of the employer to contract with others to perform services previously done by its employees (War.R. 111-112).

This conclusion, the court said, rested on two grounds. First, all subjects not specifically covered by the collective agreement remain matters of management. Second, the union in this case actually had sought to negotiate in 1956 a clause dealing with subcontracting. Under those circumstances it would be inconsistent "with basic principles governing the construction of a contract" for a court to construe it to give the union the provision it unsuccessfully sought to have incorporated (War.R. 112).

The statements in the grievance that the company's actions were "discriminatory" and constituted a "partial lockout" were not sufficient to bring the grievance into the "range of arbitration," the court said, since the actions complained of, by whatever name called, were exempted from arbitration. Any contention that they constituted a violation of the contractual provision against discrimination against members of the union or of the provisions prohibiting lockouts was "insubstantial" (War.R. 113).

Judge Rives, dissenting, limited himself to the "partial lockout" and "discrimination" contentions set forth in the grievance, although he noted that the grievance need not meet the precise requirements of strict pleadings (War.R. 113-14). The agreement, he said, contained provisions flatly prohibiting lock-outs and discrimination against union members. If, as charged, the Company's actions did constitute a partial lockout or were discriminatory, then they violated the agreement. The determination of that question, he concluded, was for the arbitrator.

The argument that subcontracting was "strictly a function of management" and that, therefore, no dispute involving subcontracting could be arbitrable he found not to withstand analysis. First, he said, the management clause in the contract did not sustain it. That clause specified management rights but did not expressly reserve the unlimited right to subcontract. Nor did the district court's finding that the company had in fact subcontracted work without

union protest in the past fill the gap. The question to be arbitrated here was not whether management's rights included the right to subcontract work. The union did not contest that right. The question was whether, under the circumstances of the case, management abused the right by exercising it in a way which violated other provisions of the agreement. That question, he said, was not "strictly" one of management's rights. Second, he said, the failure of the union to obtain the clause forbidding all subcontracting which it proposed in 1956 did not prove that the contract could not be construed in a more limited way, as prohibiting subcontracting which violated other provisions of the agreement.

Finally, he concluded, the findings of the district court that no violation of the contract occurred went to the merits of the grievance, not its arbitrability. It was unnecessary, in his view, to decide whether the Fifth Circuit should adopt the *"Cutler-Hammer"* doctrine (*International Ass'n of Machinists* v. *Cutler-Hammer, Inc.*, 271 App. Div. 917, 67 N.Y.S. 2d 317, *aff'd*, 297 N.Y. 519, 74 N.E. 2d 464 (1947)), as the Sixth Circuit did in the *American Manufacturing* case, or reject it as the First Circuit did in *New Bedford Products Defense Div.* v. *Local 1113, UAW*, 258 F. 2d 522 (1st Cir. 1958), since the grievance in this case was not so lacking in substance as to fall within the ambit of the *Cutler-Hammer* doctrine (War.R. 149 n. 8).

D. The Enterprise Case No. 538

This case began in a way similar to the other two, but it comes to this Court in a somewhat different posture. Here the district court ordered arbitration of discharge grievances, but the company, after arbitrating, refused to comply with the award requiring reinstatement of the grievants with back pay. As it comes to this Court, the issue in the case is whether the court below erred in modifying the dis-

trict court's order directing that the arbitrator's award be enforced in full.

From April 5, 1956 through April 15, 1957, a collective bargaining agreement between the company and the union was in effect which prescribed the wages, hours and working conditions for the employees and which also provided a grievance procedure of the usual kind, including the right ultimately to submit any "differences . . . as to the meaning and application of the provisions of this Agreement" to arbitration (Ent.R. 2a-4 to 6). Special provisions were made for discharge cases, requiring suspension and a hearing before discharge and providing that, if any employee was discharged after such hearing, he could appeal the discharge through the grievance procedure (Ent.R. 1a-17, 18). The remedy in discharge cases, as well as the standard to be applied by an arbitrator in such cases, was specified in the following provision of Article IV:

> "Should it be determined by the Company or by an arbitrator in accordance with the grievance procedure that the employee has been suspended unjustly or discharged in violation of the provisions of this Agreement, the Company shall reinstate the employee and pay full compensation at the employee's regular rate of pay for the time lost." (Ent.R. 1a-18)

The grievance arose on January 17, 1957, when a group of eleven employees covered by the agreement left their jobs in protest against the discharge of another employee. Within thirty minutes, the employees were advised by a union staff representative to return. They then requested, and were given, permission from the president of the company to return to work. A few moments later, however, the president, after consulting his attorney, informed the local union president that the eleven men who had gone out "would not be permitted to return at the present time" (Ent.R. 2a-20). When the men attempted to return to work the following day, they found their time cards missing

from the rack, and they were told that they "didn't have any job there any more until this thing was settled one way or the other" (Ent.R. 2a-21).

On January 23 a grievance was filed, claiming that the men had been discharged improperly and without cause. (Ent.R. 2a-18). The grievance was not settled in the preliminary steps of the grievance procedure, and on February 17 the union requested that the matter be submitted to arbitration, in accordance with the agreement. The company first refused to arbitrate. Subsequently, the company changed its position and agreed to submit the matter to arbitration, and Milton H. Schmidt was chosen by the parties as the arbitrator. On April 6, 1957, however, the company again changed its position, and notified the union by letter that it would not arbitrate (Ent.R. 2a-2).

The union then brought an action in the United States District Court for the Southern District of West Virginia, under Section 301, to specifically enforce the arbitration provisions of the collective bargaining agreement. After the company had filed its answer (Ent.R. 2a-8), the union moved for summary judgment. The matter was heard on the pleadings and affidavits. The court rendered an oral opinion (Ent.R. 2a-11), and entered an order directing "specific performance of Step Four of Article III of the Agreement" (Ent.R. 1a-15).

Accordingly, the grievance was submitted to the arbitrator, who had previously been appointed by the parties. The company contended before the arbitrator that the employees had quit, that their discharge was justified by their participation in an unlawful strike, and that the grievance was, in any case, moot, since the agreement had expired on April 4, 1957.

The arbitrator found that the men had not quit and that their discharge was not justified (Ent.R. 2a-17 to 24). Conceding that their brief strike was improper, he found that management had agreed to permit them to return to

work and further that the company had violated its contractual obligation first to suspend employees before finally discharging them. The facts, he held, warranted at most a disciplinary suspension of 10 days for each of the grievants.

The arbitrator specifically rejected the contention that he could not order the grievants reinstated because the agreement had expired after their discharge. The controversy as to their right to reinstatement and back pay was a continuing one and Article IV of the agreement, he held, imposed an unconditional obligation on the company. Accordingly, he awarded reinstatement with back pay, minus the pay for the 10-day suspension period and such sums as the grievants might have received from other employment (Ent.R. 2a-23, 24).

The company refused to comply with the award, and the union moved the district court for an order directing the company to show cause why it had not done so (Ent.R. 2a-24). On December 16, 1958, the court rendered an opinion and an order directing the company to comply with the arbitrator's award (Ent.R. 1a-1, 3).

The district court, after rejecting the company's contention that Section 301 did not confer jurisdiction on the federal courts to enforce arbitration awards providing benefits for individual employees, found that the award was valid and enforceable in every respect. It rejected the company's argument that the award was not sufficiently specific as to the manner of calculating back pay to be enforceable, and in answer to the argument that the employees could not be reinstated because the agreement had expired, the court pointed out that

> "To allow the defendant to only reimburse the employees up until April 4, 1957, would be to allow the defendant to profit unfairly from its own wrong doing. If the men had not been unjustly discharged, it must be assumed that their employment would have con-

tinued to date; until reinstated, these employees continue to suffer loss of wages by virtue of the defendant's improper action irrespective of any expiration of the contract." (Ent.R. 1a-10, 11)

On appeal, the Court of Appeals for the Fourth Circuit first agreed with the district court that section 301 conferred jurisdiction on the federal courts to enforce an arbitration award rendered under a collective bargaining agreement, relying on its opinion in *Textile Workers* v. *Cone Mills Corp.*, 268 F. 2d 920 (4th Cir. 1959), *cert. denied*, 361 U.S. 886 (1959). It also held that the failure of the award to specify the amounts to be deducted from the back pay awarded made the award unenforceable as it stood, but that the defect could be remedied by requiring the parties to complete the arbitration so that the amounts due could be specifically ascertained.

The court of appeals also decided that the award of back pay for the period subsequent to April 4, 1957, could not be enforced. The court reasoned that because collective bargaining agreements "do not create a permanent status or condition, or give an indefinite tenure, or extend rights created and arising under the contract beyond its term," it followed that employees who were discharged unlawfully during the term of an agreement could not enforce an award for back pay covering a period after the agreement had expired. On that reasoning, the court modified the judgment so as "to limit the recovery of wages for loss of time to the period of the contract and to require the parties to take appropriate steps to complete the arbitration. . . ." (Ent.R. 49)

The union filed a petition for rehearing. On August 22, 1959, the petition for rehearing was denied (Ent.R. 51); but on the same day, the court modified its opinion so as also to omit from the portion of the award to be enforced the requirement for reinstatement of the discharged employees (Ent.R. 50). The net result was a holding that

employees discharged during the period of an agreement in violation of its terms were denied enforcement of an award ordering reinstatement because the award was rendered after the agreement had expired.

The only questions presented by the union's petition for certiorari relate to the action of the court of appeals in reversing the district court's order with respect to reinstatement and back pay subsequent to the termination of the agreement.

SUMMARY OF ARGUMENT

I. The decision of the Court in *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957), establishes that grievance arbitration is to be enforced in the federal courts as a matter of federal substantive law by looking at the policy of federal labor legislation and fashioning a remedy that will effectuate that policy. The problems to be solved in these cases, therefore, must be solved in the light of the function of the grievance procedure and its capstone, arbitration, in the collective bargaining process intended to be fostered by the National Labor Relations Act.

The purpose of the collective bargaining agreement is to avoid strikes by the negotiations of a standard to govern the future conduct of the parties. But the execution of an agreement does not serve this purpose, even if it restricts the right of the parties to use economic pressure to change its conditions during its term, unless there is some system of peacefully resolving disputes arising as to the interpretation and application of the agreement. It is impossible to anticipate or expressly deal with every problem which may arise during the term of a collective bargaining agreement. Furthermore, there are strong pressures in the collective bargaining process to find formulae which can result in an agreement even though they contain ambiguities. The method which is ordinarily

provided for resolving these ambiguities and providing a a kind of common law under which problems within the scope of the agreement are resolved is the grievance procedure.

The grievance procedure is an integral part of the collective bargaining process and has been recognized as such by the Congress, which included within the duty to bargain the duty to negotiate concerning questions arising under a collective bargaining agreement. Through the process of interpretation and application of the agreement, through the grievance procedure, gaps are filled in and the meaning of deliberately ambiguous phraseology is determined.

There is no requirement that the terminal point of the grievance procedure be arbitration. In many agreements the union reserves the right to strike if grievances are not resolved. But the Labor Management Relations Act of 1947 declared that the most desirable method for the settlement of grievance disputes was arbitration. Where this statutory policy is fully effectuated in a collective bargaining agreement, as in these cases, we have an agreement for a fixed term which sets the standards to be applied in the employment relationship, which provides a grievance procedure in which management's actions in particular cases can be tested, and which provides both an arbitration provision for unresolved grievances and an absolute prohibition of strikes during its terms. Such agreements should be enforced in a manner consistent with the legislative policy that all matters in dispute during the term of an agreement should be resolved through arbitration.

The generous scope which should be given to an agreement to arbitrate grievances is emphasized by two facts. First, if the agreement contains an absolute ban against strikes, it constitutes a complete code governing the employment relationship. In any area in which there is no restriction on management's rights with respect to the em-

ployment relationship, the agreement necessarily must be read as giving management unlimited rights. The scope of the contract is the entire employment relationship. Second, it is plain that the kind of interpretation required of a labor agreement which serves as an all-embracing code is wholly unlike the kind of contract interpretation customarily performed by the courts. In order that this procedure operate as Congress intended it should as a peaceful method of resolving all disputes which arise during the term of an agreement, it is necessary that the courts respect and defer to the jurisprudence which has been developed in the interpretation and application of collective bargaining agreements.

II. The typical broad arbitration clause provides for arbitration of any disputes as to the meaning, interpretation, and application of the collective bargaining agreement. If the claim which the union wishes to present in arbitration is a claim that particular action taken by the management violates some provision of the agreement, express or implied, then that dispute should be found arbitrable and arbitration compelled. Similarly, in an action to enforce an award, if the arbitrator rendered his decision as a matter of interpretation and application of the agreement, the award should be enforced irrespective of the court's views as to the merits of the decision.

The courts, both state and federal, have developed two doctrines which have qualified this simple standard. The first is the *Cutler-Hammer* doctrine, under which the court makes a preliminary examination of the grievance to determine whether there is at least some basis upon which the union can make a respectable argument. This doctrine, represented here by the *American Manufacturing* case, is at war with both the words of the typical grievance arbitration provisions and its purpose. A decision that a grievance is not arbitrable because it is baseless con-

stitutes a final and binding decision on the merits by the court in place of the arbitrator whom the parties have agreed shall make that decision. Furthermore, it unbalances the collective bargaining relationship unless it is also held that the union has the right to strike if the employer refuses to abide by the agreement for reasons which are baseless or frivolous. It would be possible to limit the no-strike clause in that fashion, but such limitation would be destructive of the entire purpose of substituting the grievance and arbitration procedure for the strike. Finally, even the arbitration of frivolous grievances serves a useful purpose in the collective bargaining process since oftimes such arbitration serves as a safety valve for pressures which would otherwise result in illegal strike. The parties can, of course, contract that only grievances having some appearance of merit be arbitrated, but in the absence of such limitation, no court should refuse to compel arbitration because of its views as to the probable outcome in arbitration.

The second limitation developed by the courts is represented by the rule adopted by the First Circuit and by the Fifth Circuit here in the *Warrior and Gulf* case. This rule is that the court must, before ordering arbitration, determine for itself whether any specific provision of the agreement controls the grievance. There are two difficulties with this approach. First, as we have shown above, any collective bargaining agreement must necessarily contain many implied provisions. Particularly where there is an absolute no-strike clause, a finding that there is no provision in the agreement, express or implied, limiting management's action is the equivalent of an affirmative provision specifically giving management the right to take that action without fear of concerted action by the employees. Second, every grievance which sets forth a claim that management's action violates some provision of the agreement necessarily involves the interpretation and

application of the agreement. So long as there is a claim based on a particular clause or upon a contention that a restriction on management's action must be implied from the agreement there is no warrant for the court to inquire as to whether the claim is soundly based.

This view is not inconsistent with the principle that arbitration can be enforced only where the defendant has contracted to arbitrate, and it is the only one which will prevent the courts from becoming engaged wholesale in the determination of grievances on their merits.

III. The decision of the Sixth Circuit in the *American Manufacturing* case is disposed of very simply by what has already been said. The grievance concededly involved the application of a specific provision of the agreement and the arbitration provision is the typical broad one. It was not proper for the court to evaluate the merits of the grievance and dispose of it. That function the parties reserved for the arbitrator, no matter how "baseless" the grievance might appear to a court.

The case does serve, however, as a convenient illustration of the errors a court can make when faced even with a simple grievance. For the grievance is clearly not "baseless." The court assumed, as the premise for its conclusion, that the grievant's right to reinstatement was governed by the provision requiring seniority to be considered in the selection of employees for reemployment only "where ability and efficiency are equal." It is not at all clear, however, that, properly interpreted, the agreement does not give an absolute right to reinstatement to an employee who has been ill or disabled, subject only to management's right to discharge him for inability to perform the work. Certainly it would be strange to assume that the seniority status which is expressly conferred and protected by the agreement can be terminated in the case of an employee who has been temporarily absent due to ill-

ness, even if he has fully recovered, merely because his ability and efficiency are not superior to that of his replacement. Even assuming the applicability of the equal ability test, furthermore, there was no showing that other employees might not be less able or less efficient than the grievant. Finally, the kind of evidence before the court on a motion for summary judgment was clearly not such as to assure the conclusion that there could be no basis upon which the grievance could be granted.

IV. The question in the *Warrior & Gulf* case is somewhat more difficult, but should be resolved on the same basis. The contracting out of work, against which the grievance was filed, presents a very troublesome problem of contract application. Arbitration decisions differ, but they all agree that the question of whether the action of management in contracting out particular work has the effect of violating employee rights under the agreement is a question of interpretation and application of the agreement. The court below concluded, however, that under this agreement there was no provision dealing with contracting out and that the grievance did not, therefore, even present a question for arbitration. This would plainly be erroneous under the typical arbitration clause.

In this case, however, it was provided that "matters which are strictly a function of management shall not be subject to arbitration". This was construed by the court below as excluding arbitration of any contracting out grievance, no matter what the facts. This was erroneous. Properly construed, the limitation is the equivalent of the usual clause limiting arbitration to the interpretation and application of the agreement. This is so because the management action complained of in every grievance is taken pursuant to management's function, and right, to manage. The question in every grievance is whether management has exercised that function in such a way as to deprive employees of rights conferred on them by the agree-

ment. Management's undoubted right to hire and fire and direct the working forces is balanced against the specific protections provided elsewhere in the agreement. By limiting arbitration only to cases not involving "strictly," *i.e.* solely, a matter of management, the arbitration clause in this case merely requires that grievance be rested on a claim of violation of some provision of the agreement, express or implied. This is particularly obvious when it is noted that, except for this clause, the grievance and arbitration procedure would apply to "local trouble of any kind," whether or not a claim of contract violation was involved. The grievance in this case plainly did rest on the contract. Whether that reliance was well placed was for the arbitrator not for the court, as the Tenth Circuit has held in a substantially identical case, *Local 1912, IAM* v. *United States Potash Co.*, 270 F.2d 496, now pending in this Court on petition for certiorari. The history of bargaining on the subject of contracting out, and the past instances of it, which were also relied on by the court below and which are not present in the *U. S. Potash* case, plainly go to the merits of the grievance, not arbitrability.

V. In the *Enterprise* case, the district court ordered arbitration and the arbitrator held that the grievants were discharged in violation of the agreement, and were entitled to reinstatement with back pay notwithstanding the fact that the agreement had expired. He based this result not on the law of contract damages, but on the language of the agreement, which expressly prescribed that employees unjustly discharged during its term were to be reinstated with back pay. The arbitrator rejected the company's argument that once the agreement expired, the remedial provision also expired, holding instead that the remedy was applicable to all discharges which took place during the term of the agreement.

The court below, in holding that the award was en-

forceable only to the extent that it granted back pay up to the termination date of the agreement, erroneously considered the issue one of law. When an arbitrator rules that an employer has an obligation to take affirmative action to remedy a violation of the agreement, he is not enforcing the law or awarding damages, he is interpreting the agreement as requiring the employer to take that action. Since questions of interpretation and application of the agreement are for the arbitrator, the court should not review his decision on an action to enforce the award, any more than the court should pass judgment on the merits of a grievance before ordering arbitration.

Even under the common law, arbitrators' awards are not reviewable for error of law or of fact. This common law principle is at least as appropriate in the area of grievance arbitration as it is in commercial arbitration.

The court's decision means, in effect, that the question of whether employees who were discharged in violation of an agreement during its term should be reinstated cannot be an arbitrable question after the agreement has expired, but must be settled in collective bargaining. This decision is squarely contrary to the decision of the Sixth Circuit in *N.L.R.B.* v. *Knight Morley Corp.*, 251 F.2d 753 (1957) and the decision of the National Labor Relations Board in *Local No. 611, Int'l Chemical Workers*, 44 L.R.R.M. 1164, 123 N.L.R.B. No. 182 (June 5, 1959). In *Knight Morley*, the court held that even after an agreement expired, an employer may lawfully insist that the grievance and arbitration procedure is the only forum in which to discuss the reinstatement of employees who were discharged during the term of the agreement, and therefore may refuse to bargain about this subject at the bargaining table. And in *Chemical Workers*, the N.L.R.B. went one step farther and held that it was an unfair labor practice for a union, after the expiration of a collective bargaining agreement, to insist at the bargaining table on the

reinstatement of employees discharged during the term of the agreement, since that is a question which, under the agreement, can be settled by arbitration.

If the decision below is permitted to stand, therefore, it will mean that a union will be absolutely unable to gain reinstatement for employees discharged in violation of the agreement, once the agreement expires. The same would presumably be true as to any violation of an agreement which can be remedied effectively only by reinstatement of the status quo.

The effect of this situation on the smooth operation of the grievance and arbitration provisions of collective bargaining agreements could be disastrous. If the decision below is sustained it will be advantageous to employers to resist settling even meritorious grievances, and to delay arbitration as long as possible, in the hope that the expiration date of the agreement will come before an arbitrator's award can be rendered. This could mean the virtual destruction of the grievance procedure, particularly in short term agreements.

Even if the N.L.R.B.'s *Chemical Workers* decision is assumed to be erroneous, as we think it is, it would be contrary to the policies of the act to require the parties to settle by economic force issues which can and should be settled by the peaceful process of arbitration.

None of the precedents relied on by the court below involved the question of the authority of an arbitrator to interpret an agreement as requiring an employer to take affirmative action even after the agreement itself has expired. Rather, the cases cited by the court involved the totally different question of whether action taken by an employer after expiration or modification of an agreement can be deemed to be a violation of the agreement. These cases are therefore not relevant to the case at bar.

Finally, the decision below is inconsistent with the approach taken by this Court in *Vitarelli* v. *Seaton*, 359 U.S.

535 (1959). In that case, the Court held that an employee discharged from the Department of the Interior on security grounds, without being given the procedural rights he was entitled to under an Order of the Department, must be reinstated with back pay even though the Department could have discharged him summarily without any procedural safeguards, since the Department had not in fact exercised its power to discharge summarily. Although there are substantial factual differences between that case and the present case, the principle that an employee who is unlawfully discharged should be reinstated with full back pay even though he could have been discharged lawfully is fully applicable here. Indeed, the present case follows *a fortiori* from *Vitarelli*, since the question of remedy in *Vitarelli* was an original question for the court, while here the question is one of interpretation and application of the agreement to be decided by an arbitrator. Surely, if a court *must*, without benefit of any statute, grant reinstatement in an analogous situation, an arbitrator, who has the power to interpret and apply the agreement, *has the authority* to find that reinstatement, even after the term of the agreement, is the indicated remedy for a discharge in violation of the agreement which took place during its term.

ARGUMENT

I. THE RULES GOVERNING ACTIONS TO COMPEL ARBITRATION OR ENFORCE AWARDS UNDER SECTION 301 MUST BE BASED ON THE POLICY OF THE FEDERAL LABOR LAWS AND MUST BE CONSISTENT WITH THE ROLE OF GRIEVANCE ARBITRATION IN THE COLLECTIVE BARGAINING PROCESS.

It is our position that the courts below erred in refusing to compel arbitration in the *American Manufacturing* and *Warrior and Gulf* cases, and in refusing to enforce in full the arbitrator's award in the *Enterprise* case. Before exam-

ining the particular way in which we believe the courts of appeals erred in each of the cases, it is perhaps desirable that we set out explicitly the basic approach which we urge that the Court adopt in dealing with all three.

A. *The question here is one of labor law, not arbitration law.*

The first premise of any discussion of the problems here presented must be that it is a labor relations statute which is being enforced, not an arbitration statute. These cases are here because Congress, in 1947, decided as a matter of labor policy that collective bargaining agreements should be enforceable in the federal courts. Pursuant to that decision it enacted Section 301 of the Labor Management Relations Act, in order to "promote industrial peace." S. Rep. No. 105, 80th Cong., 1st Sess., p. 17 (1947).

In *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448 (1957), this Court was called upon to determine whether, in a suit brought under Section 301(a), the grievance arbitration provision of a collective agreement could be specifically enforced even though, under state law, such a provision was unenforceable. The Court decided that arbitration could be enforced. And the decision of the Court in *Lincoln Mills* is therefore the premise upon which these cases must be decided.

In *Lincoln Mills,* the Court did more than conclude that grievance arbitration was specifically enforceable. The method by which it came to that conclusion was as important as the conclusion itself. Although the parties had alternatively argued, in accordance with the prior decision of the First Circuit in *Local 205* v. *General Electric,* 233 F. 2d 85, that authority for the desired result could be found in the United States Arbitration Act, 9 U. S. C. § 1 *et seq.*, the Court wholly ignored that statute. Grievance arbitration, the Court held, was enforceable in the federal courts as a result of the policy expressed in the federal labor relations law, not as a result of any law or policy governing arbitration as such.

The substantive law to be applied in suits arising under § 301(a), the Court said, was federal law to be fashioned from the policy of our national labor laws. 353 U. S. at 456. Some problems arising in fashioning that law could be resolved by reference to the substantive law contained in the Labor-Management Relations Act and "the penumbra of expressed statutory mandates." Others, the Court said, will be "solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy." 353 U. S. at 457.

Once the Court approached the enforcement of grievance arbitration from the viewpoint of labor policy the answer was, of course, clear. Grievance arbitration is an animal completely different from ordinary contract arbitration. Other arbitration is a substitute for litigation, and the ancient judicial hostility to the enforcement of executory agreements to arbitrate arose from this fact. As Mr. Justice Storey said in a passage quoted by Mr. Justice Brandeis in *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 121:

> "... When [the courts] are asked to ... compel the parties to appoint arbitrators whose awards shall be final, they necessarily pause to consider whether such tribunals possess adequate means of giving redress, and whether they have a right to compel a reluctant party to submit to such a tribunal, and to close against him the doors of the common courts of justice, provided by the Government to protect rights and to redress wrongs."

Thus, where the courts believe, as this Court did in *Wilko* v. *Swan*, 346 U. S. 427 (1953) that there are special statutory protections for one party to a contract which may not be given full effect if the controversy is finally decided in a substitute forum they will not enforce the agreement to arbitrate.[5]

[5] Both the majority and the dissenting opinions in *Wilko* v. *Swan*

When dealing with a contractual substitute for litigation courts may be justified in examining carefully the agreement to arbitrate before compelling a reluctant party to submit to such a tribunal, and closing against him "the common courts of justice, provided by the government to protect rights and to redress wrongs." A dispute if not arbitrable is still litigable. Indeed, an argument as to whether a dispute is arbitrable in such a situation is an argument as to whether the dispute shall be decided by an arbitrator or by a court.

As this Court explicitly recognized in *Lincoln Mills*, however, this whole approach is inapplicable to grievance arbitration. The agreement to arbitrate grievance disputes is not a substitute for litigation. It is the substitute for a strike, or, as the Court stated it, the "*quid pro quo* for an agreement not to strike." 353 U. S. at 455. It is primarily a method of insuring industrial peace during the term of a labor agreement, not a method of providing more economical or speedier adjudication than is available in the courts.[5a]

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exemplify the conception of arbitration as a substitute for litigation. In the words of Mr. Justice Reed, for the Court, at p. 438:

> "Congress [by the Arbitration Act] has afforded participants in transactions subject to its legislative power an opportunity generally to secure prompt economical, and adequate solution of controversies through arbitration if the parties are willing to accept less certainty of legally correct adjustment."

Or, in the words of Mr. Justice Frankfurter, dissenting, arbitration has "the advantages of providing a speedier, more economical, and more effective enforcement of rights . . . than can be had by the tortuous course of litigation." 346 U. S. at 439-440. The difference between the opinions was a difference between the relative weight which should be given to statutory protection offered by the Securities and Exchange Act, on the one hand, and the Congressional recognition of the parties' voluntary designation of a non-judicial tribunal on the other. Both sides recognized that the agreement to arbitrate was an agreement to provide a fast and inexpensive substitute for litigation.

[5a] For a more complete discussion of the differences between commercial arbitration and grievance arbitration, see Brief for Petitioner, pp. 30-39, *Textile Workers* v. *Lincoln Mills*, October Term 1956, No. 211.

And, as we shall show below, a holding that a dispute is not arbitrable does not simply mean that it is to be resolved in the courts rather than by an arbitrator but, in reality, means in the usual case that the dispute is resolved finally in favor of the party opposing arbitration.

Unthinking reliance in grievance arbitration cases on the rules developed by the courts in dealing with ordinary contract arbitration—illustrated we believe by such discussion as is found in *Engineers Ass'n* v. *Sperry Gyroscope*, 251 F. 2d 133, 137 (2d Cir. 1957) and *Refinery Employees Union* v. *Continental Oil Co.*, 268 F. 2d 447, 454 (5th Cir. 1959) —thus constitutes an example of "one of the most treacherous tendencies in legal reasoning . . . the transfer of doctrines which are, in effect, generalizations developed for one set of situations to seemingly analagous yet essentially very different situations." *Braniff Airways, Inc.* v. *Nebraska State Bd.*, 347 U. S. 590, 603 (1954) (dissenting opinion of Mr. Justice Frankfurter).

B. ***The grievance and arbitration procedure of a collective bargaining agreement has special characteristics derived from the nature of the agreement and the national labor policy.***

Analysis of the function of the grievance procedure and its capstone, arbitration, in the collective bargaining process[5b] must begin with the National Labor Relations Act. Section 9 of that act, 29 U.S.C. § 159, confers on a union chosen by a majority of employees in a collective bargaining unit the power and responsibility to act as "exclusive" representative for all the employees in the unit "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." The employer is obliged to bargain with that

[5b] For a thorough discussion of "The Structure of the Collective Bargaining Process," with particular emphasis on the role of the grievance procedure, see Appendix A of Brief for Petitioner, *Association of Westinghouse Salaried Employees* v. *Westinghouse Elec. Corp.*, October Term 1954, No. 51.

representative concerning all of the innumerable subjects which come under the heading of wages, hours, and working conditions, and the union has the right to attempt to enforce compliance by the employer with its position on any of those subjects by initiating concerted activities by the employees, including a strike. §§ 7, 13, 29 U.S.C. §§ 157, 163.

As the late Dean Shulman pointed out, "one might conceive of the parties engaging in bargaining and joint determination, without an agreement, by considering each case as it arises and disposing of it by *ad hoc* decision." Shulman, *Reason, Contract and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1003 (1955). Such *ad hoc* bargaining, however, is neither practical nor in accord with the statutory objective. One of the principal purposes of collective bargaining is to avoid strikes and other forms of industrial conflict. See N.L.R.A. § 1, 29 U. S. C. § 151. The method for doing this is, in Dean Shulman's words, for the parties to negotiate "an agreement to provide standards to govern their future conduct." Or as this Court early stated, "the purpose of the statute was to compel employers to bargain collectively with their employees to the end that employment contracts binding on both parties should be made." *NLRB* v. *Sands Mfg. Co.*, 306 U. S. 332, 342 (1939). And the duty to bargain collectively, as defined in Section 8(d) of the act as added in 1947, 29 U. S. C. § 158(d), includes the duty of bargaining concerning "the negotiation of an agreement" and also includes the duty of "execution of a written contract incorporating any agreement reached if requested by either party."

The execution of an agreement, even for a fixed term, will not alone serve the purpose of securing industrial peace. First of all, there must be some restriction on the parties' right to use the economic weapons at their disposal in an effort to change the provisions of the agreement during its term. Hence, this Court held in the *Sands* case that col-

lective action to force changes in an agreement during its term was not concerted action protected by Section 7 of the act. And, in 1947, Congress went further and in Section 8(d), 29 U. S. C. § 158(d), specifically excluded from the duty to bargain any obligation "to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period."

This only solves part of the problem, and indeed only a small part. There must be, in addition, some system of peacefully resolving disputes arising under the agreement. Although described as a "contract" in Section 301(a), the collective bargaining agreement more nearly resembles a statute. It is, as previously stated, a standard to govern future conduct. And since it is a negotiated standard, with all the necessities for compromise and even deliberate ambiguity which such negotiation often requires, and must govern a myriad of individual cases, it is a standard which necessarily often speaks in the most general terms.

It is impossible to anticipate every problem which may arise during the term of a collective bargaining agreement, and it would be impossible ever to conclude an agreement if the parties attempted to resolve every potential problem which they did anticipate. Many subjects therefore are dealt with in the agreement only in the most general terms. For example, on the critical question of what constitutes a proper ground for discharging employees, the collective agreement usually only provides that there must be "just cause" or, as in the *Enterprise* case, provides that an employee must be reinstated if he has been disciplined "unjustly." (Ent.R. 1a-18. See also, Am.R. 6, War.R. 18) There is no attempt and indeed could be no attempt to catalogue, or even define with great explicitness, what might constitute "just cause." Dean Shulman expressed it this way:

"Since the parties earnestly strive to complete an agreement, there is almost irresistible pressure to find

> a verbal formula which is acceptable, even though its meaning to the two sides may in fact differ. The urge to make sure of real consensus or to clarify a felt ambiguity in the language tentatively accepted is at times repressed, lest the effort result in disagreement or in subsequent enforced consent to a clearer provision which is, however, less favorable to the party with the urge. With agreement reached as to known recurring situations, questions as to application to more difficult cases may be tiredly brushed aside on the theory that those cases will never—or hardly ever—arise." Shulman, *Reason, Contract and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1004 (1955)

The difficulty is accentuated where, as in the usual case, the agreement is intended to cover the entire employment relationship. It is possible, of course, for the parties to exempt certain subjects from the agreement, preserving their freedom to negotiate, and to strike, over issues on which they cannot reach agreement as to the standard to be applied. This is the practice, for example, in the automobile industry, where the parties deliberately refrain from establishing the standards to govern the critical question of the speed of the production line. This issue is kept as an issue on which the union, after the necessary preliminary negotiations, retains the right to strike even during the term of the agreement.[6]

The usual practice in American industry, however, is exemplified in the three cases now before this Court. In these cases there is no contemplation of the addition of new provisions to the agreement during the term, or of negotiation with the right to strike on subjects omitted from the agreement. The agreement is intended to govern the total employment relationship. It describes not only the rights of

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[6] Bureau of National Affairs, Collective Bargaining Negotiations and Contracts 77: 102-103.

the employees and the ways in which management's normal prerogatives to hire, fire, promote, assign employees and otherwise operate the plant will be limited, but also in what areas management will be permitted to exercise unrestrained discretion because there is no limitation in the agreement. The usual collective bargaining agreement, in short, is not only a statute governing the conduct of the parties during the term of the agreement, it is a complete code.

Most agreements, as in the three now before the court, contain a management clause, expressly conferring upon the employer unrestrained discretion in matters pertaining to the employment relationship except as that discretion is limited by the agreement. In other contracts this right of management may be implied. Whether the provision for management's rights is expressed or implied, the collective bargaining agreement constitutes a complete code of standards to govern the employment relationship during its term. It provides not only the benefits which the employees will be entitled to and the rules for their distribution but also, by negative implication, what benefits they are not entitled to receive. It necessarily has this effect because, in the agreement, the employees and the union give up the right to strike or take other concerted action concerning changes in the agreement or additions to it in the entire area of "rates of pay, hours of employment, or other conditions of employment." The agreement is fixed for the term and it therefore confers upon management the right to take any action with respect to such matters except as limited by the agreement. It contains, as it were, a Tenth Amendment.

When we couple this conclusion with the tremendous scope of the subject matter and the necessary nature of the negotiating process it becomes plain that the application and interpretation of this code is as much a part of the collective bargaining process as is the negotiation of the code itself. Much that is unspoken must be implied or drawn

from accepted understandings and practices in labor relations generally and from accepted understandings and practices of the parties to particular agreement. Tremendous gaps must, of necessity be filled in.[7]

> "There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. . . . [T]he institutional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement." Cox, *Reflections Upon Labor Relations,* 72 Harv. L. Rev. 1482, 1499 (1959).

And even where standards are specified, they must be given content. Meaning can be given to standards such as "just cause" or "equal ability" only in the process of administration and adjudication. And federal law explicitly recognizes this process as part of the collective bargaining process. The duty to bargain as defined in Section 8(d) of the act includes not only the duty to confer concerning

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[7] One of these cases, *American Manufacturing,* for example, concerns the claimed right of an employee who had been absent because of disability to return to his job. The agreement plainly contemplates some such right, since it preserves the employees' seniority status during the absence. But it does not say whether the employee is entitled to return to his old job, or only to vacant jobs, and if only to vacant jobs, whether in his departmental seniority unit or in the entire plant. Nor does it say what is to happen if he is unable to perform his old job but can perform others. In that case, can he displace less senior employees on the jobs he can perform, or must he wait for vacancies? In either case, to which jobs does his right apply, those in his departmental unit or all of the jobs in the plant? The agreement gives no explicit answers. Nor is the *American Manufacturing* agreement singular in that respect. These questions are not explicitly answered in the agreements in the other two cases or, we might add, in the labor agreements covering the basic steel industry.

the negotiation of an agreement but also the duty to confer "on any question arising thereunder."

During the term of an agreement, the collective bargaining process does not take place by negotiation but by a process of application of the agreement to individual cases as they rise. The first step is not a meeting but action by management. Management hires and fires. It schedules the work, promotes and demotes. It lays workers off and recalls them. It pays wages and vacation and holiday benefits. These are all management functions. The employees, through the union, participate in the process through the filing and processing of grievances claiming that management's actions are contrary to the standards set forth in the agreement, either expressly or impliedly. It is in the processing, adjustment and settlement of these grievances that the continuing collective bargaining relationship takes place. See *Hughes Tool Co.*, 104 N. L. R. B. 318, 326-327 (1953).

In the light of these considerations it is plain that the process of interpretation and application of a collective bargaining agreement though the grievance procedure has certain special characteristics. Grievances do not arise only because of differences as to matters of fact, such as whether an employee did or did not commit certain acts or even whether a particular senior employee has the ability to fill a higher-rated job for which he has applied in accordance with the seniority provisions of the agreement. Nor are such disputes limited to the explication of broad standards such as "just cause" for discharge. Many disputes will involve disagreement as to whether management's rights in a particular area are or are not impliedly limited by the agreement. For example, if an agreement does not explicitly deal with discharges at all but does provide a system of seniority rights to govern promotions, transfers, layoffs, etc., is management restricted at all in its power to discharge employees? See *Atwater Mfg. Co.*, 13 Lab. Arb. 747 (1949). When an agreement provides for overtime pre-

miums but does not say whether employees must work overtime, can management require employees to work more than 40 hours? See *Sylvania Elec. Products, Inc.*, 24 Lab. Arb. 199 (1954). Or if an agreement specifies specific rates for specific job classes, is management free to determine without opportunity for a review whether a particular job falls in one class or another? The resolution of such disputes is necessarily a part of the continuous collective bargaining structure which is represented by the grievance procedure.

As in every collective bargaining process there must be a terminal point to the grievance procedure. The terminal point of the grievance procedure can be the right to strike. That was the case in *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.* 348 U. S. 437 (1955). Today the typical collective bargaining agreement, as in all three of the cases now before this Court, provides for arbitration as the terminal point.

This, again, is in accordance with the policy of our national labor laws. Without provision for the arbitration of grievances, the object of minimizing industrial strife and eliminating strikes is only partially achieved by the negotiation of an agreement. And so Section 203(d) of the Labor Management Relations Act, 1947, 29 U.S.C. 173(d) provides in part as follows:

> "(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

Where this statutory policy is fully effectuated in a collective bargaining agreement, as in these cases, we have, then, an agreement for a fixed term which sets the standards to be applied in the employment relationship for its term, which provides a grievance procedure in which management's actions in particular cases can be tested against

the general standards provided for or implied in the agreement, and which provides both an arbitration provision for unresolved grievances and an absolute prohibition of strikes during its term. Such agreements are fully in accord with the policy and the specific provisions of our national labor laws. Since Congress has declared in Section 301 that such agreements should be enforced as contracts, they should be enforced in a manner consistent with those policies.

C. The statute and the national labor policy require that the court's recognize the broad scope of arbitration as an integral part of the collective bargaining structure.

Where the parties have provided, as they usually do, that all questions of interpretation and application of the agreement which cannot be solved by the grievance procedure are to be resolved in arbitration, and that there shall be no strikes during the term of the agreement, all of the questions of the kind referred to above must necessarily be regarded as coming within the scope of the grievance and arbitration system. For a decision that the particular subject is not "covered" by the agreement is really a decision that under the agreement management's rights with respect to that subject are unrestrained.

Obviously the process of interpreting and applying a collective bargaining agreement requires more than a familiarity with the English language.

> "The generalities, the deliberate ambiguities, the gaps, the unforeseen contingencies, and the need for a rule even though the agreement is silent all require a creativeness in contract administration which is quite unlike the attitude of one construing a deed, a promissory note, or a 300-page corporate trust indenture. The process of interpretation cannot be the same because the conditions which determine the character of the instruments are different." Cox, *Reflections on Labor Arbitration,* 72 Harv. L. Rev. 1482, 1493 (1959).

This kind of "creative" interpretation requires skills and data unlike those involved in that kind of contract interpretation customarily performed by the courts. Grievance arbitration has become something of an institution. It has its own body of jurisprudence, which is familiar to both labor and management. Labor arbitrators have become a profession unto themselves, complete with their own professional academy. Courts are by and large unfamiliar with this institution. It is not necessary that they become familiar with it, but it is necessary that they respect it and defer to it if it is to continue to operate effectively as Congress intended it should, as a peaceful method of resolving industrial disputes.

Respectable argument can be made that the collective bargaining agreement as a whole, including the arbitration process, would best serve its purpose if it were not judicially enforceable. See Shulman, *Reason, Contract, and Law in Labor Relations,* 68 Harv. L. Rev. 999 (1955), Aaron, *On First Looking into the Lincoln Mills Decision,* Arbitration and the Law—Proceedings of the Twelfth Annual Meeting National Academy of Arbitrators 1 (McKelvey ed., 1959). Much of the American labor movement has traditionally taken that view.[8] But Congress has settled that argument by enacting § 301(a). Its constitutionality is now established and it has been applied, without question by any member of the Court, as authorizing the development of federal law in suits involving damage liability of unions for violation of a no-strike clause. *Lewis* v. *Benedict Coal Corp.,* 28 U. S. Law Week 4105 (February 23, 1960). It remains for this Court to develop and apply, in suits by unions to enforce the *quid pro quo* for such a clause, doctrine which will, through the "usual processes of the law" which Congress consciously chose instead of the administra-

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[8] H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 42.

tive processes of the Labor Board,[9] effectuate the expressed Congressional purpose to promote industrial peace.

II. UNDER THE TYPICAL GRIEVANCE ARBITRATION CLAUSE, THE ONLY QUESTION FOR THE COURT IN AN ACTION TO COMPEL ARBITRATION IS WHETHER THE CONTENTION SOUGHT TO BE ARBITRATED IS THAT MANAGEMENT HAS VIOLATED THE AGREEMENT, WITHOUT REGARD TO THE COURT'S VIEW OF THE MERITS OF THAT CONTENTION; IN AN ACTION TO ENFORCE AN AWARD, THE ONLY QUESTION IS WHETHER THE AWARD IS BASED UPON THE AGREEMENT, WITHOUT REGARD TO THE COURT'S VIEW OF THE MERITS OF THE DECISION.

The typical arbitration clause usually contains language similar to that contained in the American Manufacturing Company agreement:

> "Any disputes, misunderstandings, differences or grievances arising between the parties as to the meaning, interpretation, and application of the provisions of this agreement, which are not adjusted as herein provided, may be submitted to the Board of Arbitration for decision. . . .
>
> "The arbitrator may interpret this agreement and apply it to the particular case under consideration but shall, however, have no authority to add to, subtract from, or modify the terms of the agreement. . . .
>
> "The decision of the Board of Arbitration shall be final and conclusively binding upon both parties, and the parties agree to observe and abide by same. . . ." (Am.R. 7-8).[9a]

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[9] H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 42.

[9a] This is in substance the arbitration provision which has been recommended by the War Labor Board (*e.g., Hospital Supply Co.*, 7 War Lab. Rep. 526, 529 (1943)), the President's National Labor-Management Conference of 1945 (Vol. 3, doc. 89), and the American Arbitration Association (In Labor Arbitration Procedures and Techniques, p. 9 (1958)).

In any action to compel arbitration or to enforce an award, the question presented is whether, under that or similar language, the employer is obligated to submit to arbitration the particular grievance which the union wants to arbitrate, or whether, if there has been an arbitration, the employer is obligated to comply with the award.

If the views we have set forth above as to the nature and function of arbitration under this kind of clause are correct —and we do not believe that they can successfully be controverted—the answer to the question is both clear and simple. If the claim which the union wishes to present in arbitration is that a particular action of management violates some provision of the agreement, express or implied, then the dispute is within the arbitration clause and arbitration should be compelled. Similarly, in an action to enforce an award, if the arbitrator rendered his decision as a matter of interpretation and application of the agreement, the award was within his jurisdiction and should be enforced, absent fraud or some other element which vitiates the proceeding.

These answers are so simple, the marvel is that they require stating at all. Yet the incredible fact is that most courts have, in one way or another, given quite different answers, or qualified their answer in a way which destroys its effectiveness. And this, in turn, has led to a flood of criticism by students of labor arbitration, many of whom have reached the conclusion that the courts are simply incapable of comprehending the nature of grievance arbitration. See, *e.g.* Summers, *Judicial Review of Labor Arbitration or Alice Through the Looking Glass,* 2 Buff. L. Rev. 1 (1952); Mayer, *Judicial "Bulls" in the Delicate China Shop of Labor Arbitration,* 2 Lab. L. J. 502 (1951); Cox, *Current Problems in the Law of Grievance Arbitration,* 30 Rocky Mt. L. Rev. 247 (1958); Kharas & Koretz, *Judicial Determination of the Arbitrable Issue,* 11 Arb. J. 135 (1956); Aaron, *On First Looking into the Lincoln Mills Decision,*

op. cit. supra.; Cox, *Reflections upon Labor Arbitration,* 72 Harv. L. Rev. 1482 (1959).

The simplest, and most destructive, qualification has come to be referred to as the *Cutler-Hammer* doctrine, and first found expression in *International Ass'n of Machinists* v. *Cutler-Hammer, Inc.,* 271 App. Div. 917, 67 N.Y.S. 2d 317, *aff'd,* 297 N.Y. 519, 74 N.E. 2d 464 (1947). Under this doctrine, a court which is requested to order arbitration can refuse to do so on the ground that the answer to the grievance on the merits is so clear that there is nothing to arbitrate. In the *Cutler-Hammer* case itself, the Appellate Division said:

> "If the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration."

The *Cutler-Hammer* doctrine has been criticized by every student of the question who has written on it and it is doubtful whether the New York courts themselves today follow the *Cutler-Hammer* doctrine. See Kharas & Koretz, *Judicial Determination of the Arbitrable Issue,* 11 Arb. J. 135 (1956); Note, 10 Syracuse L. Rev. 278 (1959). The Court of Appeals for the First Circuit has clearly rejected the *Cutler-Hammer* doctrine:

> "[I]f . . . the grievance in question is confided to an arbitrator by the collective bargaining agreement, the court in a §301 proceeding has no business to concern itself with a preliminary question whether the answer to the grievance on its merits may or may not be entirely clear under the language of the agreement." *New Bedford Defense Products Division* v. *Local No. 1113, UAW,* 258 F. 2d 522, 526 (1958).

The *Cutler-Hammer* approach is represented here by the decision of the Sixth Circuit in the *American Manufacturing* case, which we will deal with more in detail below. It

has also, apparently, been adopted by the Second Circuit which, relying on precedents in commercial arbitration, has said that the moving party must "produce evidence which tends to establish his claim" before a court will compel arbitration. *Engineers Ass'n* v. *Sperry Gyroscope Co.*, 251 F. 2d 133 (1957), *cert. denied*, 356 U.S. 932 (1958). See also *Butte Miners Union* v. *Anaconda Co.*, 159 F. Supp. 431 (D. Mont. 1958), *aff'd*, 267 F. 2d 940 (9th Cir. 1959).

At first glance, the *Cutler-Hammer* view may seem reasonable. Why should a court of equity compel an employer to arbitrate a grievance which is clearly without merit, one might ask. The answer at the verbal level is that the agreement does not limit the employer's obligation to arbitrate to grievances which a court thinks have merit. Rather, the employer has undertaken to arbitrate any disputes over the interpretation and application of the agreement which cannot be settled between the parties. In determining that a grievance is "baseless" or "frivolous" the court has assumed the function which the parties have assigned to the arbitrator. A denial of arbitrability on the ground that the grievance is baseless constitutes a final and binding decision on the merits. The union, in exchange for the agreement not to strike, has obtained the right to arbitrate all disputes arising under the agreement, not only cases which management or a court believes have at least some appearance of merit.

The necessity of this conclusion is emphasized if we turn the coin over. If a union is to be deemed to have the right to process only grievances which have some appearance of merit, is management required to grant all grievances unless the union or a court believes there is some reasonable ground for believing that the grievance is not meritorious? Limiting the scope of the arbitration clause only to cases in which there is some uncertainty as to the outcome must imply a legal obligation on both parties; on the union not to press claims which a court regards as baseless and on

the company not to press defenses which a court regards as baseless. But there is no way in which such a mutual obligation can be enforced other than by reading an exception into the "no strike" clause so as to permit the union to strike whenever a grievance which is plainly meritorious is not granted. Such a result is possible, but it would be destructive of the whole system under which the grievance and arbitration procedure is substituted for the strike as a method of settling all disputes during the term of an agreement.

The arbitration clause, then, is not an agreement that only meritorious disputes will be arbitrated, it is an agreement that all disputes over the interpretation or application of the agreement will be arbitrated, and it must be so construed if the policy of our national labor laws is to be implemented. Furthermore;

> "it is common knowledge in industrial relations circles that grievance arbitration often serves as a safety valve for troublesome complaints. Under these circumstances it seems proper to read the typical arbitration clause as a promise to arbitrate every claim, meritorious or frivolous, which the complainant bases upon the contract. The objection that equity will not order a party to do a useless act is outweighed by the cathartic value of arbitrating even a frivolous grievance and by the danger of excessive judicial intervention." Cox, *Current Problems in the Law of Grievance Arbitration,* 30 Rocky Mt. L. Rev. 247, 261 (1958).

The second qualification is a more sophisticated one and is best represented by the line taken by the Court of Appeals for the First Circuit in *Local 149* v. *General Electric Co.,* 250 F. 2d 922 (1957), *cert. denied,* 356 U.S. 938 (1958) and *Local 201* v. *General Electric Co.,* 262 F. 2d 265, 271 (1959). Although the force of these decisions is somewhat limited by the fact that, in at least one of the cases, and perhaps in both, the no-strike clause was limited only to grievances found to be arbitrable by a court, 262 F.2d at

268, the doctrine set forth in the cases was followed here by the Fifth Circuit in the *Warrior & Gulf* case and in *Refinery Employees* v. *Continental Oil Co.*, 268 F. 2d 447 (1959), *cert. denied*, 80 Sup. Ct. 199 (1959).

The rule, as stated by Judge Magruder in the *Local 201* case is:

> "It is not enough that appellant local may claim that the . . . grievance necessitates an interpretation or application of the seniority provisions of Art. XI. The Court must be satisfied that this claim is well founded, that is that the arbitrator can use those provisions as a controlling statute to decide the merits of the grievance."

This was applied, in the *Local 201* case, to conclude that an employee's claim that the company violated the seniority clause of an agreement by transferring him, rather than a junior employee, to the night shift was not arbitrable because the seniority provisions did not cover shift changes. The *Local 149* case involved a grievance claiming that a group of employees had been paid at a rate below that to which their jobs entitled them. The rates of pay for various job grades, referred to by number, as "grade 14," "grade 13," etc. were set out in "Exhibit B" of the agreement, but the agreement did not expressly describe the particular jobs which fell into the various job grades. The court concluded that this grievance could not involve the interpretation and application of the agreement, "since there is no language in the collective bargaining agreement to be interpreted and applied for the purpose of determining whether the duties performed by a particular employee entitled him to be classified in any particular 'grade' carrying with it a corresponding wage rate." 250 F. 2d at 924-5. Therefore the court concluded that the grievance was not arbitrable.

The fallacy of the approach illustrated by these cases is that, as we have explained above, every grievance is gov-

erned by the agreement, either positively or negatively, particularly where the agreement contains a broad no-strike clause. For the denial of the grievance—or the preliminary denial of its arbitrability—constitutes a decision that, under the agreement, management's rights include the right to take the action complained of without limitation and without opportunity for redress by the employees.

Thus the decision as to whether the action complained of in a particular grievance is covered, or not covered, by the agreement necessarily involves an interpretation of the contractual clause relied on. The court's decision in the *Local 201* case, that the seniority clause governing employees to be "transferred" could not be read as limiting management's right to change an employee's shift, was as much an interpretation and application of that seniority clause as a decision that the union's grievance was valid would have been. Since the parties had agreed that questions of interpretation and application of the agreement were to be decided by an arbitrator, the court, rather than deciding the issue itself, should have ordered that it be submitted to arbitration.

The decision in the *Local 149* case equally, although perhaps less clearly, involved the interpretation of the agreement. As Professor Cox points out:

> "The words 'grade 14,' 'grade 13', etc. had meaning to everyone in the plant; for the established grades were part of the context in which the contract was executed, and although there might be argument about borderline cases, the system must have been plain enough so that most of the men could be classified with assurance. The entire wage scale would be upset by wholesale downgrading. In my view, there plainly was a dispute about the 'interpretation' to be put upon the words and symbols of Exhibit B. They had significance to the supervisors and rank-and-file workers to whom they were directed even though the court might not

known their meaning." Cox, *Reflections on Labor Arbitration*, 72 Harv. L. Rev. 1482, 1513 (1959).

But whether Professor Cox or the First Circuit are correct, clearly their difference was one which should not have been resolved by the court but by an arbitrator. Whether the agreement did or did not entitle the grievants to the rate of pay they claimed to be entitled to was clearly a question of interpretation and application of the agreement. They claimed it on the basis of the agreement. A conclusion that the agreement contained no "governing statute" giving them the right to the pay constituted a decision that management was entitled, under the agreement, to pay them at the lower rate.

We conclude, then, that the role of the courts in enforcing grievance arbitration is simply to determine whether the union seeking arbitration is claiming that the employer violated the agreement. If that is the claim it is arbitrable, even though the court cannot find any basis for the claim in the agreement, or even if the court thinks that on the facts of the case the claim is clearly without merit.

This view is not in the least inconsistent with the court's "inescapable obligation to determine as a preliminary matter" before ordering the parties to arbitrate a particular issue "that the defendant has contracted to refer such issue to arbitration, and has broken this promise." *Local 149* v. *General Electric Co.*, 250 F.2d at 927. We do not contend that the court must order arbitration without examining the nature of the parties' agreement to arbitrate. We contend only that an agreement to arbitrate "any question of interpretation and application" of a collective bargaining agreement must be construed to mean that whenever either party claims that the agreement has been violated an arbitrable question is presented. This is the only construction which would permit grievance arbitration to perform its function as a substitute for the strike, and as the *quid pro quo* for an absolute agreement not to strike. Moreover, this is the only construction which is consistent with the federal labor poli-

cies which, as this Court held in *Lincoln Mills*, is the source from which the federal law governing collective bargaining agreements must be derived.

The *Lincoln Mills* case certainly did not intend to make a potential federal question out of every industrial grievance. Yet if a court must determine whether or not a grievance is "baseless," or must interpret the substantive terms of the agreement before it compels arbitration, it will necessarily have to conduct a hearing on the merits of the particular dispute. To require the parties to litigate the merits of a grievance twice not only would be an unwarranted burden on them, it would be a burden on the federal courts.

Decisions such as those in the courts below have led some students of labor relations to conclude that the institution of grievance arbitration will be hindered rather than helped by the *Lincoln Mills* decision. See Aaron, *On First Looking into the Lincoln Mills Decision*, Arbitration and the Law—Proceedings of the Twelfth Annual Meeting National Academy of Arbitrators 1 (1959); Feinsinger, *Enforcement of Labor Agreements, a New Era in Collective Bargaining*, 43 Va. L. Rev. 1261 (1957). It is certainly ironic that the *Lincoln Mills* decision, which was intended to promote grievance arbitration, is now being criticized in some quarters as being detrimental to the arbitration process. In our view that criticism is misdirected. It is not *Lincoln Mills* but the failure of some courts to apply *Lincoln Mills* properly which has led both to unnecessary litigation in the federal courts and to unwarranted judicial interference with the arbitrator's jurisdiction.

III. THE SIXTH CIRCUIT ERRED IN REFUSING TO ORDER ARBITRATION OF THE GRIEVANCE PRESENTED IN THE *AMERICAN MANUFACTURING* CASE.

A. *The grievance, concededly involving the interpretation and application of the agreement, is arbitrable irrespective of court's views as to its merits.*

As far as the *American Manufacturing* case is concerned,

very little need be added to what we have already said. The union's claim in that case very clearly involved a claim of violation of a specific provision of the agreement, namely, the seniority clause (Am.R. 20). The company had consistently taken the position that it had not violated that clause. There was therefore a dispute between the parties "as to the meaning, interpretation, and application" of that clause. Under the language of the agreement, such a dispute, if not otherwise adjusted, "may be submitted to the Board of Arbitration for decision" (Am.R. 7-8). The company refused so to submit it. The union was therefore entitled to an order compelling arbitration.

The Sixth Circuit refused to compel arbitration solely on the ground that it considered the grievance "baseless" and "frivolous." It did not dispute the fact that the issue between the parties concerned the interpretation and application of the agreement. Indeed, the court specifically stated that "a dispute or difference exists between the parties which, under Article IV, the appellant would be entitled to have submitted to arbitration, unless barred for the reason hereinafter discussed" (Am R. 68). Thus, the court refused to order arbitration, not because the grievance was not arbitrable under the agreement, but because the court considered the grievance clearly invalid on its merits. We have already indicated the reasons why that is not a proper ground on which to refuse to order arbitration.

The case, however, does furnish a convenient illustration of the errors which a court can make when it adopts the *Cutler-Hammer* approach and makes its own preliminary judgment as to whether a grievance is or is not "baseless." For the grievance in this case involves very difficult questions of contract interpretation as well as differences in the evaluation of the grievant's capabilities. It may be useful, therefore, to explore these questions.

B. *The grievance here involved serious questions of contract interpretation.*

Essentially, Sparks' claim was based on the seniority provision of the agreement, which stated in pertinent part as follows:

> All new employees shall be considered on a temporary or probationary basis for the first sixty (60) days of their employment. If retained after that period an employee is to be considered as a qualified regular employee and shall have seniority status as of the date of employment.
>
> The Company and the Union fully recognize the principle of seniority as a factor in the selection of employees for promotion, transfer, lay-off, re-employment, and filling of vacancies, where ability and efficiency are equal. It is the policy of the Company to promote employees on that basis.
>
> * * * *
>
> When an employee is off due to illness he shall notify the Company as soon as possible and shall confirm by mail not later than three (3) days from the beginning of absence from work.
>
> Continued illness shall be reported once each week by mail, and the Company may require medical proof of illness.
>
> Failure to report illness in accordance with above described procedure can be considered as a voluntary quit.
>
> The Company will furnish forms for reporting by mail at no cost to the employee. (Am.R. 11)

The Court assumed, without discussion, that under this clause Sparks could be reinstated only if his ability and efficiency were equal to some other (unspecified) employee or employees. But that would be true only if the right of an employee to return to work after absence due to sickness or

disability were governed by the clause governing "the selection of employees for promotion, transfer, lay-off, re-employment, and filling of vacancies . . ." Is reinstatement after an illness "re-employment"? On analysis, that is a very unlikely interpretation. Since the sentence speaks in terms of "selection" of employees, it seems to contemplate the situation in which there is a group of employees desiring a smaller group of job opportunities—as for example, in the case of a cutback in production. But the case of an employee who has been absent due to sickness or disability is quite different. He is simply asking to be given the same status which he would have had had the sickness not occurred. In other words, he is simply asking that his "seniority status" "as a qualified regular employee," which is conferred by the first paragraph of the seniority clause, be restored.

The court's interpretation would mean that whenever an employee is absent due to sickness, he would have no right to return to work even if he could demonstrate that he had fully recovered his health and previous ability, unless he could demonstrate that his "efficiency and ability" are equal to some else's, presumably that of the person who occupied his job during his illness. This is totally out of keeping with normal employment practices, even in unorganized enterprises.

It can be argued, in other words, that the refusal to restore an employee who has been off sick to his job is subject to the same rules as if he had never been away. The question is not, then, whether his abilities are equal to those of someone else, but whether there is sufficient ground to displace him from his job. The agreement provides standards to cover such cases. The management clause (Am.R. 6) specifically provides that among the causes for discharge are inefficiency, contagious disease, "and any other ground or reason that would tend to reduce or impair the efficiency of plant operation." It certainly does not say that an em-

ployee can be discharged whenever his ability and efficiency are not equal to other employees.

Thus, it is probable that the requirement of "equal" ability and efficiency does not apply to employees seeking reinstatement after an illness or disability, and that by virtue of the "seniority status" conferred by the first paragraph of the seniority clause, such an employee is entitled to be reinstated unless his ability and efficiency are so low as to justify his discharge. At the very least, the court's interpretation of the agreement, which it assumed without any discussion of possible alternative interpretations, is very questionable.

But let us assume that the requirement of "equal" efficiency and ability does apply to an employee seeking to return to work after an absence due to illness or disability. Whose ability and efficiency would Sparks have to equal in order to get back his job? Would the standard be the most able and efficient employee in the plant, the average ability and efficiency of the employees in the plant (or the department or the crew), the least able and efficient of the employees, or would it have to be the employee with whom he was competing for the job, *i.e.*, the man who had replaced him when he was sick? The court does not say. There is no evidence in the case as to the ability and efficiency of any other employee. Perhaps the employee whose ability and efficiency Sparks must equal also has had a previous back injury, or perhaps he is an unusually inefficient and incompetent man. Would that not be relevant even under the court's interpretation? In the absence of evidence on that question, could the court, even under its own interpretation of the seniority provision, logically conclude that the grievance was baseless?

The court apparently assumed that the efficiency and ability which Sparks was required to "equal" were of the highest quality, although there is no basis in the record for that assumption. Then, turning to the evidence concerning Sparks' physical condition, the court ruled that it was friv-

olous to contend that Sparks could meet this standard of ability. In reaching this conclusion, the court relied on four things: the allegations made by Sparks in the workmen's compensation proceeding, the earlier position of Sparks' doctor that Sparks was 25 percent permanently disabled, the testimony of the company doctor that Sparks was still unable to do work requiring heavy lifting or prolonged stooping or bending, and the testimony of the Plant Manager that there were no jobs in the plant which did not require heavy lifting, stooping, and bending.

The allegations made by Sparks in the workmen's compensation case could all have been true when made and yet Sparks, by the time the grievance was filed, might have fully recovered his physical ability to work. Moreover, one would be less than realistic to assume that the pleadings in a workmen's compensation case are always the complete and unexaggerated truth. One arbitrator, dealing with a very similar case, had this to say:

> "Claims are often filed and settlements negotiated when the employee's real condition is not entirely clear. This is particularly true in back and heart cases. The employee needs the money; the insurance company is anxious to conclude the matter so as to terminate liability. Moreover, a certain percentage of cases take on the litigious atmosphere of personal injury lawsuits; the employee feels he must exaggerate his symptoms, the insurance company feels it must minimize the injury, and both sides can find doctors who will support their respective views. Under these circumstances the participants often lose sight of the true purposes of Workmen's Compensation; proper treatment, prompt rehabilitation, and restoration to the labor forces. It may be that this is the best system for handling occupational injury which human intelligence can devise. It may be that a more satisfactory method can be developed. At any event, it is clear that Espinosa's re-

ceipt of a compromise settlement did not bar him from reinstatement in line with Article VIII of the Collective Bargaining Agreement." *Convair Division*, 27 Lab. Arb. 288, 290 (Arthur M. Ross, Arbitrator, 1956.)

Thus, it can safely be said that regardless of what Sparks' attorney might have written in his workmen's compensation pleading, it is very possible that Sparks, at the time he filed his grievance, was as able to work as any other employee.

As for Sparks' doctor's earlier opinions, they are certainly not conclusive in view of his later opinion that Sparks was "able to return to work without danger to himself or to the others." The court discounts that later statement, saying that it "falls far short of saying that he could return to his former position with 'ability and efficiency' equal to that of other employees." The court chose to believe the company doctor because his statement was more specific. But could Sparks' doctor's opinion not also be interpreted to mean that Sparks had fully recovered, and was fully as able to work as he had been before? And should we not assume, in the absence of contrary evidence, that Sparks prior ability and efficiency were satisfactory? For purposes of summary judgment, should the evidence not be construed in the light most favorable to the union?

It can safely be concluded, we submit, that the court below erred in ruling that the Sparks grievance was "baseless." In making this ruling, the court assumed without discussion that under the agreement Sparks would have to demonstrate "equal efficiency and ability." This assumption is probably false. At least, it is questionable, and surely the arbitrator, and not the court, should have decided just what the rights of an employee who has been absent due to sickness or disability are under the agreement. In addition, the court held that it was "frivolous" to contend that Sparks' ability and efficiency were equal to that of some other employee or employees, without even facing the ques-

tion of just what employee's ability Sparks had to equal, and without any evidence on what that employee's ability was. Finally, the court did not correctly evaluate the evidence which was available as to what Sparks' ability and efficiency were at the time the grievance was filed.

Thus, this case is a perfect illustration of the inability of courts to make a correct preliminary judgment on the merits of a grievance, and the absolute necessity of holding the parties to their obligation to arbitrate all disputes concerning the proper interpretation and application of the agreement.

IV. THE FIFTH CIRCUIT ERRED IN REFUSING TO ORDER ARBITRATION OF THE GRIEVANCE PRESENTED IN THE *WARRIOR AND GULF* CASE.

A. *The nature of the grievance.*

The grievance in this case alleged that the employer had violated the collective bargaining agreement by contracting out to independent concerns work which had formerly been performed by employees in the bargaining unit. The subject of contracting out of bargaining unit work is not specifically mentioned in the agreement, and the union did not contend that the agreement prohibited any and all such contracting out. Rather, the union's position was that the agreement impliedly prohibited management from contracting out when the result of such action would be to deprive employees of rights to which they were entitled under the agreement, and that that was the effect of the action taken by the company in this case.

The problem presented by this grievance is a familiar one in labor relations. A recent arbitration decision by the past president of the National Academy of Arbitrators, G. Allan Dash, contains a thorough analysis of the problem and a complete review of all of the arbitration decisions dealing with it. *Celanese Corp.*, 33 Lab. Arb, 925 (1959). This decision contains a tabulation of 64 cases in which a union

challenged management's action in contracting out work despite the fact that the applicable agreement did not deal expressly with this subject at all. In 45 of these cases, the arbitrators held that the agreements contained certain implied limitations on the management's right to contract out. Most of the remaining cases seemed to hold that there was at least a requirement that the action be taken by the company in good faith, and not for the purpose of undermining the collective bargaining relationship. Most significantly of all, not one of the arbitrators had any doubts that the question involved the interpretation and application of the agreement, although in 10 cases the argument was made that the grievance was not arbitrable. 33 Lab. Arb. 925 at 941-945.

This is an area in which arbitration decisions differ widely, depending not only on the underlying attitude of the arbitrator, but on the facts of the particular case, the practices and customs in the plant, and the language of the agreement. A few hypothetical cases will demonstrate that there can be no simple, uniform rule to govern all cases of contracting out. Suppose a typical collective bargaining agreement—such as the one in this case—covers the production and maintenance workers in a large manufacturing establishment. Suppose the management determines to lay off, not a few, but all of its production workers, retaining its supervisory staff and continuing its manufacturing operation at full speed by contracting with an independent firm to supply labor to be performed in the plant. Suppose that the decision to do this is based on reasons of economy, resulting from the fact that the contractor could supply labor at lower rates and without the fringe benefits specified in the collective bargaining agreement.

Under these circumstances, even without any specific mention of the subject of subcontracting, it would seem eminently reasonable to find a violation of the employer's agreement that certain rates should be paid for certain jobs

and that the workers on those jobs should have seniority rights.

When we move from this extreme hypothetical situation to situations where only a portion of the work previously done by the employees in the bargaining unit is contracted out, the problem becomes more difficult. This is the kind of situation which is presented when a portion of the maintenance work, such as window washing or janitorial services, is contracted out, although the bulk of the bargaining unit work remains to be performed by the regular employees. If the contractor, in addition to supplying labor also supplies equipment and materials, and completely performs a definite segment of work unrelated to the main business of the plant, it becomes increasingly difficult to find a contract violation. Also significant is whether the work which is contracted out is done on the employer's premises or is done at the premises of the contractor. At the opposite extreme of our initial hypothetical case is one in which an employer decides that he will not produce a certain part of the material he has formerly produced but will purchase it from a contractor. In that case a claim that the employer is violating an implicit agreement not to narrow the collective bargaining unit is highly unlikely to be successful.

Between the two extremes there is, of course, a broad spectrum. Each case must rest upon its own facts. A decision in no case can really be reached by broad statements that contracting out is a function of management or, on the other hand, that the employer has a duty not to undercut the agreement which he has made as to the wages, hours and working conditions of those who perform certain jobs. Relevant in each case will be not only the nature and amount of the work contracted out, the place in which it is performed, and the motivating factors behind the company's decision to contract the work out, but also the whole fabric and history of the collective bargaining relationship as well as, perhaps, the existing practice in the plant or even

in the industry which the parties may have assumed when they made their collective bargaining agreement.

B. ***The grievance in this case is arbitrable under the arbitration clause of the agreement.***

The court below held that "the contract before us does not deal with the power of the employer to contract with others to perform services previously done by its employees." (War.R. 111). In so holding, it held in effect that *no* contracting out grievance, even the extreme hypothetical case set out above, would be subject to arbitration. This is plainly untenable, since the purpose of a collective bargaining agreement which contains an absolute no-strike clause is to provide the rules which will govern *all* the problems which arise in connection with the employment relationship during its term. It may be that under the agreement management has the unrestricted right to contract out any or all bargaining unit work. But if so, it has that right by virtue of the agreement.

How can this be, one might ask, when management would have the right to contract out work in the absence of any agreement? How can the agreement confer on management a right which it already has, especially when the right is not even mentioned in the agreement? The answer is that by inclusion of the no-strike clause, the agreement confers on management a right which it does not otherwise have—the right, in areas where it is not restricted by the agreement, to take actions with respect to matters relating to wages, hours and working conditions without prior consultation with the union, and without fear of economic reprisal from the union. This is a very valuable right. In a sense, without a collective bargaining agreement management does not have the right to do anything relating to the employment relationship without the consent of the union representing its employees. That consent may be negotiated, or it may be given tacitly after negotiations reach an impasse, by virtue of the union's inability to call

or to sustain a strike. But consent which is given out of economic necessity is consent nonetheless, and in a very real sense it is the only kind of consent which exists in labor relations. Thus the effect of a collective bargaining agreement which contains a no-strike clause is that the union has "consented," in advance, to any action which management might take which is not in violation of any express or implied provision of the collective bargaining agreement.

Therefore, the question whether the company had the right to take the action complained of by the grievance in this case is a question which could only be answered by an interpretation and application of the collective bargaining agreement. Under the usual arbitration clause, therefore, that question would plainly be arbitrable.

The arbitration clause in this case, however, is written somewhat differently than most. It begins with this rather perplexing sentence:

> "Issues which conflict with any Federal statute in its application as established by Court procedure or matters which are strictly a function of management shall not be subject to arbitration under this section." (War.R. 15).

Taken out of context, this is almost gibberish. It seems intended to exclude something from "arbitration," but what? In order to answer that, it is necessary first to read the rest of the "Adjustment of Grievances section."

Immediately after the sentence quoted above comes the following paragraph:

> "Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise, there shall be no suspension of work on account of such differences, but an earnest effort shall be made to settle such differences in the following manner:" (War.R. 15)

The section then spells out the various steps of the grievance procedure, providing in the fifth step that "if agreement has not been reached the matter shall be referred to an impartial umpire for decision. . . The decision of the umpire shall be final" (War.R. 16).

In the absence of the opening sentence, the language above would make arbitrable not only "differences . . . as to the meaning and application of the provisions of this agreement" but also "any local trouble of any kind." It could be argued that this means that if "local trouble" arose as a result of the installation of new machinery, for example, the question of whether management should install that machinery would be arbitrable, even if it were conceded by the union that under the agreement there were no restrictions, express or implied, on management's right to do so. The effect of this argument would be to give the arbitrator the power to rewrite the agreement, and to impose additional obligations on management.

The opening sentence, then, is apparently some draftsman's inartistic attempt—perhaps made at the 11th hour of some long forgotten collective bargaining session—to preclude the union from pressing to arbitration claims not based on the interpretation and application of the agreement. In other words, unless the union contends that management's rights are limited, expressly or impliedly, by the terms of the agreement, the grievance is not arbitrable. The effect of the sentence is the same as the usual clause limiting the arbitrator to the adjudication of such claims.

The court below construed the sentence differently. It regarded the exclusion of matters "which are strictly a function of management" as requiring it to determine whether contracting out was limited by the agreement. It concluded that, in the absence of any specific clause dealing with the subject, management was entirely free to contract out work as it saw fit. That was a "function of management" and not subject to arbitration.

We have already indicated above our view that the absence of specific language on a subject does not mean that the subject is not covered by the agreement. Much must be implied in every collective bargaining agreement. This is particularly true where, as here, the no-strike clause is absolute. For in such a case, the statement of the court below "that whatever subjects are not covered by an employment contract are left to the parties to act upon as they see fit" (War.R. 111) is simply not true. Management actions not found to be restricted by the collective agreement are affirmatively protected by the agreement. The matter is not "outside the scope of the contract" (Cox, *Reflections upon Labor Arbitration,* 72 Harv. L. Rev. 1482, 1515) unless the union has the right, which it had in the absence of a contract, to strike about it. If it has given up that right, a conclusion that there is no implied limitation on management's action means that management has affirmatively been given unlimited rights in that area by the agreement.

In this case, the issue is not whether contracting out is a function of management. The issue is whether other sections of the agreement limit management in the exercise of that function. There is no question, in words of Ralph Seward, one of the nation's leading arbitrators,

> "but that the Company has—and has always had—a broad general right to contract with other companies for the furnishing of goods and services. There is also no question but that it may not properly abuse that right—that it may not exercise it in such a way as to frustrate the basic purposes of the Agreement or make the Agreement impossible to perform. The 'implied obligations' issue, as posed in this case, is not whether the Company may contract *all* of its work or *none* of its work. It is whether there was any implied contractual bar to the contracting out of *this particular . . . work, at this particular plant and under the cir-*

cumstances of this particular case." Bethlehem Steel Co., 30 Lab. Arb. 678, 682 (1958) (Italics in original).

Once the nature of the grievance is recognized it is plain that it does not involve "*strictly* a function of management." We do not wish to question management's right to manage. We wish to question only whether it has so managed as to violate other provisions of the agreement. Our grievance can properly be determined only by balancing the employee rights under the agreement with management's right to manage, not by considering "strictly" the management's right and no others.

In this respect the grievance here is the same as virtually every other grievance which can arise under this agreement. The agreement contains, in Section 11 (War.R. 17) a typical "Management" clause. This clause vests in the company "exclusively" the general right to manage the company and to direct the working forces, including the right to hire and fire and to transfer employees, and the right to relieve them from duty for lack of work. Even in the absence of such a provision the company would have such rights. After all, it is the employer. It directs what work should be done, determines which employees are to be promoted or laid off, schedules the work and pays the wages (and, even though its right to do so is not expressly mentioned in Section 11, it contracts with other companies for the furnishing of goods and services). A grievance arises under a collective bargaining agreement not because management has performed these functions. That is not only its right but its duty. A grievance arises after management has performed its function if an employee or the union complains that in performing its function it has violated some other provision of the agreement.

Thus the company undoubtedly has the right to lay employees off. But if it lays off employee "A" and employee "A" has greater seniority than employee "B" who remains at work then employee "A" can file a grievance and com-

plain that the company exercised its undoubted right to lay off in a way which was a violation of the agreement. Equally, management undoubtedly schedules the work. But if the management, in scheduling an employee, requires him to work seven consecutive days, that employee can file a grievance complaining that the company in exercising its management function has violated the provision in this agreement that no employee shall be worked more than six consecutive days without 24 hours rest (War.R. 11).

Every grievance, in short, complains about the way management has exercised its undoubted right to manage. The complaint in every case is that in exercising that right, management has violated the provisions of the agreement. This is precisely the nature of the grievance here.

It follows that if the "strictly a function of management" clause is read as requiring a showing, as a prerequisite to arbitration, that management's action does violate some restriction in the agreement, then every grievance must be shown to be meritorious before it can be arbitrated. Contracting out of work—which is not specifically mentioned in the management clause of the contract—can surely not be more a management function than the "direction of the working forces" and the "right to relieve employees from duty because of lack of work," which are expressly mentioned. And plainly the "strictly a function of management" clause cannot be interpreted so broadly as to eliminate any meaning from the arbitration procedure which follows it.

Thus, the only construction of this clause which comports with the rest of the agreement is the one which we suggested above. No grievance is to be arbitrated which involves *only* a management function, *i.e.* which does not claim that management has violated some provision of the agreement, either express or implied. So read, the arbitration provisions here are no different than those in the other two cases and should be enforced where the union

claims, as it does here, that management has violated the agreement.

This conclusion is precisely the conclusion reached by the Tenth Circuit in *Local 1912, I.A.M.* v. *United States Potash Co.*, 270 F. 2d 496 (1959), now pending in this Court on petition for certiorari, No. 554. In that case, the "Management Functions Article" provided that "all matters related to this Company and its operations and employment with or by this Company . . . are exclusively within the jurisdiction of the Company and *not subject to Union action or consent or to arbitration,* except such . . . conditions of employment . . . as are specifically provided for in the terms of this agreement. . . ." *Id* at 497 (emphasis added). The agreement did not expressly mention contracting out. Nevertheless, the court, upon an analysis of the nature of the collective bargaining agreement similar to the one which we have urged here, held that a grievance protesting the contract out of bargaining unit work was arbitrable, and ordered arbitration.

The court below also held that management's rights to contract out must be held to be unrestricted in view of the existence of such action in the past and the union's failure to obtain in negotiations a clause forbidding contract out (War.R. 112). In the light of that history, the court concluded that the union's arguments based on the agreement were "insubstantial". Even if this conclusion were correct —which it is not—it goes to the merits, not to arbitrability. And, as we have argued above, the merits of a grievance are for the arbitrator, not for the court. See *Timken Roller Bearing Co.* v. *NLRB,* 161 F. 2d 949, 955 (6th Cir. 1947) In any event, the union's claim, as Judge Rives pointed out in his dissent (War.R. 117-18), was not that all contracting out was prohibited by the agreement, but only that the particular contracting out involved in this case violated the agreement because it was of such a character as to undermine rights which the agreement guaranteed the employees.

That contention, whether the court considered it substantial or insubstantial, was clearly arbitrable under the arbitration clause of the agreement.

V. THE FOURTH CIRCUIT ERRED IN REFUSING TO ENFORCE IN FULL THE ARBITRATOR'S AWARD IN THE *ENTERPRISE* CASE.

In the *Enterprise* case, the question of the relative roles of the court and the arbitrator is presented not in the posture of an action to compel arbitration, but in the context of a proceeding to enforce an arbitrator's award. But the approach of the court should be the same in both situations. If a particular issue is entrusted to the exclusive jurisdiction of an arbitrator by the agreement, the court should neither attempt to pass judgment on that issue before ordering arbitration, nor review in any way the arbitrator's own decision before ordering the parties to comply with it.

A. *The question of whether the grievants were entitled to reinstatement with back pay was a question in the exclusive jurisdiction of the arbitrator.*

The arbitrator in this case decided that under the collective bargaining agreement the company was obliged to reinstate, with back pay, employees who had been discharged in violation of the agreement during its term, notwithstanding the fact that the agreement had expired by the time the award was rendered. This decision was based on the arbitrator's interpretation of the following provision of the agreement:

> "Should it be determined . . . by an arbitrator in accordance with the grievance procedure that the employee has been suspended unjustly or discharged in violation of the provisions of this Agreement, the Company shall reinstate the employee and pay full compensation at the employee's regular rate of pay for the time lost" (Ent.R. 1a-18).

The company argued to the arbitrator that this language was impliedly limited by the termination provision of the agreement, and that the agreement, read as a whole, could not be construed as giving any employee a right to reinstatement after the agreement expired. The arbitrator rejected this view, holding that "Article IV of the Agreement imposes an unconditional obligation on the Company to compensate an employee wrongfully discharged or suspended for time lost." (Ent.R. 2a-23)

The district court ordered the parties to comply with the award in full, but the Court of Appeals for the Fourth Circuit took it upon itself to decide *de novo* what the appropriate remedy for the improper discharges should be, and held that the grievants were entitled only to back pay for the period from their discharge to the expiration date of the agreement.

The court below seemed to treat the issue of remedy as one of law to be decided by a court. This, however, is a clearly erroneous view. When an arbitrator rules that an employer has an obligation to take affirmative action to remedy a violation of the agreement, he is not enforcing the law or awarding damages, he is interpreting the agreement as requiring the employer to take that action. That is particularly clear here, because the agreement provides an express provision dealing with the obligation of management in cases of unjust discharges. But even where such a provision is not present, a similar obligation is usually deemed to be implied in the obligation of management not to discharge except for just cause. In other words, an agreement not to discharge without cause is usually interpreted as carrying with it an obligation to reinstate a man who is so discharged. Almost every other substantive provision of an agreement is similarly interpreted by arbitrators as requiring management to take certain corrective action whenever it is found to be in violation of such a provision. See the arbitration decision cited by the Fifth Circuit in

Refinery Employees Union v. *Continental Oil Co.*, 268 F. 2d 447, 455 n. 10 (1959) *cert. denied*, 80 Sup. Ct. 199 (1959), in coming, erroneously, we believe, to the conclusion that the question of corrective action was not arbitrable. See also Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1494.

The arbitrator's decision on the question of remedy, then, is not a decision of law, but a decision as to what management was required to do under the terms of the agreement. Such a decision is not reviewable in a court.

That judicial review of the merits of an arbitrator's decision is out of keeping with the whole concept of grievance arbitration should be clear from our earlier discussion. Moreover, the terms of the agreement itself make clear that such review was never contemplated. Not only did Article III provide that arbitration awards rendered thereunder shall be "final and binding on the parties," but it further provided that

> ". . . neither party will institute civil suits or legal proceedings against the other for alleged violations of any of the provisions of this labor contract; instead, all disputes will be settled in the manner outlined in Article III—Adjustment of Grievances" (Ent.R. 2a-7).

Moreover, even in the absence of such clear language, it has always been the rule under the common law of arbitration that courts would not review the merits of arbitration awards for errors of law or of fact. Thus in an early decision this Court stated:

> "Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes it should receive every encouragement from courts of equity. If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set

it aside for error either in law or in fact. A contrary course would be a substitution of the judgment of the Chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation." *Burchell* v. *March*, 17 How. 344, 349 (1855)

As we have pointed out, and as the court below recognized, many of the rules governing commercial arbitration are not suitable to grievance arbitration problems. The rule that the merits of arbitration awards are not subject to review, however, is one which would seem to fit the needs of grievance arbitration perfectly, since it allows the arbitrator to exercise his expert judgment in applying particular agreements to particular cases, without having to worry about legal doctrines which he considers inapplicable.

This does not mean, of course, that the court could not reverse decisions in which the arbitrator exceeds his jurisdiction, or where fraud, bribery, or some other flaw in the arbitration process itself can be demonstrated. But where the arbitrator has jurisdiction to interpret and apply the agreement, his decision as to what the agreement requires the employer to do, if fairly reached, should not be reviewable by any court.

Consistent with this view, the union in this case accepted the arbitrator's determination that both 10 days wages and the amounts received by the grievants for other employment should be deducted from the back pay awarded (Ent.R. 2a-24). It might well be argued that such deduction was contrary to the flat mandate of the agreement that the Company "pay full compensation at the employee's regular rate of pay for the time lost" in such cases. But the arbitrator determined, whether rightly or wrongly, that this remedial provision allowed the deductions to be made, and that determination was in the words of the agreement itself "final and binding on the parties" (Ent.R. 2a-6).

B. *The decision below conflicts with decisions of the NLRB the Sixth Circuit, as well as with the policies of the federal labor laws.*

By refusing to enforce the arbitrator's award, the court in effect held that the question of whether the company should reinstate the grievants was not arbitrable after the agreement had expired, and could only be settled by collective bargaining. This decision is squarely in conflict with a recent decision of the National Labor Relations Board, *Local No. 611, Int'l Chemical Workers,* 44 L.R.R.M. 1164, 123 N.L.R.B. No. 182 (June 5, 1959), and a decision of the Sixth Circuit on which the Board's ruling was based, *NLRB* v. *Knight Morley Corp.,* 251 F. 2d 753 (6th Cir. 1957).

The *Chemical Workers* case arose out of a set of facts very similar to those in the present case. The employer had discharged a group of employees shortly before the termination of a collective bargaining agreement, and the union sought their reinstatement. The grievance had not reached arbitration when the termination date of the agreement approached and negotiations for a new agreement were commenced. The union, instead of continuing to push the grievance to arbitration, made reinstatement of the employees one of the bargaining demands in the negotiations for a new agreement. The employer took the position that the dispute should not be made a part of the negotiations, but should be settled under the grievance and arbitration provisions of the expired agreement. The union adhered to its position, however, and refused to agree to any overall settlement which did not provide for reinstatement of the employees. The Board held that the union, by insisting at the bargaining table upon reinstatement of the employees, had committed an unfair labor practice.

This result followed, the Board held, from two well-established principles. The first is than an employer does not violate his duty to bargain collectively if he refuses to

discuss a matter at the bargaining table on the ground that it can appropriately be disposed of under the grievance and arbitration procedure of the collective bargaining agreement. See *Timken Roller Bearing Co.* v. *NLRB,* 161 F. 2d 949 (6th Cir. 1947). The second is that it is an unfair labor practice for either party to insist to the point of deadlock on something which the other party is not obligated under the Act to bargain about. See *NLRB* v. *Wooster Division of Borg-Warner Corp.,* 356 U. S. 342 (1958).

The Sixth Circuit had previously held, in *NLRB* v. *Knight Morley Corp.* 251 F. 2d 753 (1957), that the *Timken* principle was applicable to an employer's refusal to discuss at the bargaining table the union's demand for reinstatement of certain employees who had been discharged during the term of the agreement, even though the agreement had since expired. The Board in *Chemical Workers* adopted the reasoning of the court in *Knight Morley,* and therefore concluded that it was an unfair labor practice for the union in similar circumstances to insist on reinstatement as a prerequisite to reaching an agreement. And, in doing so, it expressly relied on the *Lincoln Mills* case and the policy in favor of settling disputes through arbitration.

Therefore, under the National Labor Relations Act as it had been interpreted and applied in *Knight Morley,* the employer in the present case was not obligated even to discuss with the union, outside of the grievance and arbitration procedure, the question of the reinstatement of the discharged employees. And under the Board's *Chemical Workers* decision, the union would have been guilty of an unfair labor practice if it had insisted on such reinstatement as a prerequisite to an agreement with the company on other matters. Thus the only remedy available to the union was the grievance and arbitration procedure of the collective bargaining agreement, and this was the remedy which the union here pursued.

The decision of the court below, however, would effec-

tively deprive the union of that remedy as well, since it holds that the company need not comply with an arbitration award ordering reinstatement of these employees. Thus, although the employer violated the collective bargaining agreement by discharging the employees, and although the employees would still in all likelihood have had their jobs but for that violation, there would be no way in which the employer could be compelled to reinstate them. The union is thus truly caught on the horns of a dilemma. If it asks the employer to discuss the discharges outside the grievance procedure, the employer is free to refuse. If the union insists to the point of deadlock, it is guilty of an unfair labor practice. If it invokes the grievance and arbitration procedure, the employer can, under the decision in the present case, refuse with impunity to comply with an award ordering reinstatement of the employees. If this Court permits the decision below to stand it will mean that there is absolutely no way in which the employer's wrong can be undone, and the employees' injury be remedied.

We strongly disagree with that aspect of the Board's holding which would prohibit a union, after expiration of the agreement, from attempting to settle outstanding grievances at the bargaining table. But even if we assume that the Board erred in holding that a union is forbidden to insist at the bargaining table on reinstatement of discharged employees, the Board and the Sixth Circuit are unquestionably correct in holding that the question of reinstatement can appropriately be decided under the grievance and arbitration procedures of the agreement, even if the agreement has since expired. To hold otherwise is to frustrate both the intent of the agreement and the policies of the act.

As we have shown, the use of arbitration as a method of resolving grievance disputes is specifically stated to be an objective of the act. If the present decision is permitted to stand, however, it will seriously injure the operation of the grievance and arbitration procedures in all collective bar-

gaining agreements. Arbitration is always preceded by several "steps" in the grievance procedure, involving discussions between union and employer representatives as ascending levels of authority. Such procedures work satisfactorily only when a large proportion of grievances presented can be settled at the early stages, without resort to arbitration, since arbitration is expensive and time-consuming, particularly if a backlog of unresolved grievances is permitted to accumulate. Prior to the present decision, the existence of an arbitration clause always tended to promote the prompt and fair settlement of grievances, even in cases where the grievance never reached arbitration, since each party was aware that if its position lacked merit it would not ultimately be sustained by the arbitrator. Under the decision below, however, it would be advantageous for an employer to delay the settlement of grievances as long as possible, in the hope that by the time they reached arbitration the existing contract will have expired and an award favorable to the union would not be enforceable.

The decision below obviously cannot be limited only to discharge grievances. It will apply in every case in which the remedy for a violation of a collective bargaining agreement which took place during its term is the restoration of the status quo, and when such restoration must take place, because of the passage of time, after the contract has expired. In every such case the reasoning which the court below used in the present case would be applicable: since the employer had the absolute right after the expiration of the agreement to change the status quo, the arbitrator cannot order reinstatement of the status quo after the agreement had expired.

The net result would be a serious impairment of the objective sought to be achieved by the Labor-Management Relations Act. The grievance and arbitration procedure, instead of providing the alternative to a strike as the method for resolving disputes, which Congress declared to be de-

sirable in Section 203(a) of the act, would simply serve as a method of postponing the issue until the expiration of an agreement. Collective bargaining for a new agreement would necessarily involve not only the establishment of standards for a new agreement but also the resolution of all disputes remaining from the past.

A large proportion of collective bargaining agreements, like the one involved in the present case, are for a term of one year. Under such an agreement, an employer might be able to postpone settlement of virtually all grievances until the termination date of the agreement. Whether he did so or not, many grievances would necessarily be pending at the termination date. Even under long term agreements, this would be true as to grievances which arise during the last year or so of the agreement's term. The result necessarily will be to encourage industrial strife and to diminish the prospects for the peaceful conclusion of collective bargaining agreements.

That this result is not fanciful is illustrated by the facts of this case. The parties were able, when their agreement expired, to reach agreement on all issues dealing with the terms of a new agreement. But there has been no new agreement and there has been a strike. The sole issue is the dispute over the reinstatement of the eleven employees discharged during the term of the prior agreement (Ent.R. 2a-32). As a result of that dispute, the company and the public are not protected by a no-strike agreement, and the employees are not protected by a written agreement as to the terms and conditions of their employment.

We submit therefore, that the policies of the act will be very severely endangered if the decision of the court below is permitted to stand. This would be true even if the *Chemical Workers* case and the *Knight Morley* case did not exist. The fact that those cases do exist, and that the Board is undoubtedly going to continue to follow them, makes the situation doubly serious.

C. *The precedents on which the court below relied are inapplicable to the case at bar.*

None of the cases relied on by the court below involved the question of whether an arbitrator had the authority to decide what the remedy should be for a violation of a collective bargaining agreement which took place during its term. For that reason, alone, those cases are totally inapplicable to the present case. However, they are also inapplicable for a different reason. Even if we assume that the question of what remedy the grievants were entitled to was a question for the court, none of the cases relied on below dealt with that question. Rather they involved the completely different question of whether there had been any violation in the first place.

In *System Federation No. 59* v. *Louisiana & A. Ry.*, 119 F. 2d 509 (5th Cir. 1941), cited by the court, the question was whether employees who were furloughed during or after the term of an agreement can gain reinstatement on the basis of their seniority after the agreement expires. The principal violation alleged was the failure to reinstate, not the original furloughing. The court there held, quite properly, that the seniority rights created by the agreement existed only so long as the agreement existed, and the employer could not be said to have violated those rights after the agreement expired. There was also a claim that some of the original furloughings, which took place prior to the expiration of the agreement, were in violation of the agreement, but as to that claim the defense was that "there is no showing that [the employees] applied for and were denied reinstatement while the 1929 contract was in force." 119 F. 2d at 511. The court held that after the abrogation of the contract, these employees lost their right to *apply* for reinstatement under its terms. In the present case, however, the employees filed their claim, or grievance, promptly, long before the agreement expired, and the question was whether they lost their right to reinstatement merely because

the employer refused to give it to them promptly, and forced them to go to the trouble and expense of litigation and arbitration.

In *Elder* v. *New York Cent. R. Co.*, 152 F. 2d 361 (6th Cir. 1945), which the court also cited, the employee's claim was that he was furloughed in violation of a collective bargaining agreement which had been modified by subsequent agreements between the union and the employer prior to the alleged violation. The court simply held that a union, in its capacity as bargaining agent, can modify an agreement and thereby terminate rights which exist under it. Thus the result in that case was based on the fact that the agreement on which the claim was based was not in effect at the time the alleged violation took place. In the present case, the agreement was violated during its term, and the only question was whether reinstatement was a proper remedy. The same distinction applies to *Beeler* v. *Chicago R. I. & P. Ry.*, 169 F. 2d 557 (10th Cir., 1948), *cert. denied*, 335 U. S. 903 (1949), in which the holding was that at the time of the alleged violations the employee was not covered by any collective bargaining agreement; to *Edelstein* v. *Duluth M. & I. Ry.*, 225 Minn. 508, 31 N. W. 2d 465 (1948), in which the holding was that the discharge of the employees involved did not violate the applicable collective bargaining agreement; and to *Walker* v. *Pennsylvania-Reading Seashore Lines*, 142 N. J. Eq. 588, 61 A. 2d 453 (1948), in which the holding was that the agreement which allegedly was violated had been validly modified before the alleged violations took place.

The difference between the question of whether a violation has occurred, and the question of what the remedy should be for an admitted violation, is well expressed by another arbitrator who reached the same result as was reached by the arbitrator in the present case:

> "The Company's position on this issue appears to confuse the act of violation with the remedy provided

for the violation. When a contract violation takes place during the term of the contract, the right to seek the pertinent remedy immediately accrues. The violation opens the door and from that moment the right to relief becomes available, and this right extends as long as the resultant injury continues, notwithstanding that in the interim the contract has expired. This is graphically illustrated by the recognition that the Company does not contest the arbitrator's right to enter an award after the contract's expiration date, sustaining the propriety of the discharge. In this situation it is the other side of the coin, for in either instance, whether directing reinstatement without back pay, or whether directing reinstatement with back pay, or upholding the discharge, the arbitrator is granting relief.

"For these reasons the arbitrator concludes that the Company's position is untenable, and the arbitrator finds that he does have the power at this date to direct reinstatement with full back pay in those cases where, in his opinion, such a finding is justified." *Armour & Co.*, 11 Lab. Arb. 600, 604-605 (1948). See also *R. Hershel Mfg. Co.*, 30 Lab. Arb. 575 (1958).

The court below also cited cases to support the proposition that while the collective bargaining agreement was in effect the employees "could not be discharged without cause, but after it had expired their hiring was merely for an indefinite period which created an employment that either party might terminate at any time." This we do not deny. But the discharges in this case took place before the expiration date of the agreement, and the question as to what the employer had the right to do after termination is totally irrelevant. *Meadows* v. *Radio Industries, Inc.*, 222 F.2d 347 (7th Cir., 1955), *Atchison, T. & S. F. R. Co.* v. *Andrews*, 211 F.2d 264 (10th Cir., 1954) and the citations which followed these in the opinion below, stand only for the hornbook rule that individual employment contracts are termin-

able at will unless they explicitly provide to the contrary. They do not deal with the question which is at issue here.

Finally, the court cited *United Protective Workers* v. *Ford Motor Co.*, 223 F.2d 49 (7th Cir., 1955) and *Odell* v. *Humble Oil & Refining Co.*, 201 F.2d 123 (10th Cir., 1953), *cert. denied*, 345 U. S. 941 (1953), for the proposition that when a contract of employment provides that termination will be preceded by a period of notice, damages for improper discharge are limited to compensating the plaintiff for the notice period. We do not disagree with that statement of the law, but we do disagree with the implication that it leads to the result which the court reached in the present case.

The basis of that principle as applied to an individual employment contract is clear. It is simply a corollary of the general rule that damages are calculated so as to put the injured party in the position in which he would have been but for the defendant's wrong. If an employee is discharged summarily although his contract of employment gave him the right to one month's notice, he is entitled to one month's pay as damages, and not reinstatement, because the wrong consisted of the failure to give notice, and not the discharge. It would not be realistic to assume that if the wrong had not been committed the employee would not have been discharged; the natural assumption is that he would still have been discharged, but with the proper notice.

In a collective bargaining situation, however, the case is quite different. The protection afforded employees by a collective bargaining agreement normally is not the right to notice prior to discharge, but the right not to be discharged at all, except for just cause. Thus, if the wrong in this case had not been committed, the employer would not have discharged the employees at all. In the absence of any evidence that the employer would have discharged the employees at the termination date of the agreement, there is no

basis for assuming that he would have done so. See *Western Union Tel. Co.*, 83 N.L.R.B. 238, 239 (1949).

The error of the court's decision in the present case can perhaps best be demonstrated if we assume a slight variation in facts. Let us assume that the discharge, the arbitration proceeding, and the award all took place during the term of the agreement, but the action to enforce the award was not decided until after the expiration date. Could the court in those circumstances order the employer to comply with the award and reinstate the employees? Under the decision below, the answer would have to be no, since in the hypothetical case as in the actual case the union is asking for reinstatement at a time when the agreement has expired and the employer has the right to discharge at will. But surely the employer does not relieve himself of the obligation to abide by an award rendered during the term of the agreement solely by refusing to abide by it until the agreement expires. Similarly, he does not relieve himself of the obligation to reinstate employees who are unjustly discharged during the term of the agreement, solely by refusing to do it until the expiration date of the agreement. In neither case is the expiration of the agreement at all relevant. Once the agreement is violated, during its term, the right to a remedy vests—whether the violation is a discharge, a failure to abide by an award, or any other violation. That right is not affected by the subsequent modification or termination of the agreement, unless the right is waived by the union. The question as to what the employer had the right to do after expiration is not present or relevant; the only question is as to the appropriate remedy for a violation of the agreement which took place during its term.

D. *The decision below is inconsistent with Vitarelli v. Seaton*, 359 U. S. 535 (1959).

The decision below, that employees who were discharged in violation of an agreement during its term had no right

to reinstatement with full back pay after the agreement expired, is in conflict with the approach taken by this Court in *Vitarelli* v. *Seaton*, 359 U. S. 535 (1959).

Vitarelli, an employee of the Department of the Interior, had been discharged for security reasons on September 2, 1954. This Court held that the discharge was invalid, since Vitarelli had not been accorded the procedural rights to which he was entitled under an Order of the Department which prescribed procedures for security discharges. That aspect of the case is not relevant here. The case involved a further complication, however. The parties conceded that the Department would have had the right to discharge Vitarelli summarily, so long as the discharge was not stated to be for security reasons. On October 10, 1956, the Department had sent Vitarelli a new notice of discharge, which purported to be a substitute for the original notice and which did not state that it was based on security grounds. The Government argued, therefore, that even if the original notification of discharge was invalid, the second notification was valid, at least as of the date of its issuance, and thus precluded any reinstatement. The Court rejected that argument:

> "Granting that the Secretary could at any time after September 10, 1954, have validly dismissed petitioner without any statement of reasons . . ., we cannot view the delivery of the new notification to petitioner as an exercise of that summary dismissal power."

In other words, the Court held that *while the Government had the power summarily to dismiss Vitarelli, it had not exercised that power, and therefore the remedy for the unlawful discharge was reinstatement with full back pay.*

The dissenting opinion took issue with the majority only as to the question whether the 1956 notification should be deemed a valid exercise of the Department's power to discharge summarily. The dissenters did not disagree with the

majority's position that reinstatement would be the appropriate remedy if the power to discharge—although it was present—had not in fact been exercised.

There are of course factual differences between the *Vitarelli* case and the present case. The present case involves private employees whose rights are derived from a collective bargaining agreement; *Vitarelli* involved a Government employee whose rights derived from a Departmental Order. But there is no difference in principle, so far as the issue with which we are now dealing is concerned. For purposes of this case, the important aspect of *Vitarelli* is that the Court there held that when an employee is unlawfully discharged the appropriate remedy is reinstatement with full back pay, even though his employer could subsequently have discharged him legally, so long as the employer in fact did not discharge him legally. That principle, which the Court accepted unanimously, is equally applicable in the present case.

Indeed, the argument of the union in this case follows *a fortiori* from *Vitarelli*. The Court in *Vitarelli* decided that an employee who was unlawfully discharged was entitled to reinstatement *as a matter of law*, although the employer could have subsequently discharged him legally. In this case the parties have themselves provided that if an employee is found to have been discharged in violation of the agreement, the arbitrator shall order reinstatement and back pay. The question here is simply whether the arbitrator has the power to construe that provision of the agreement as permitting the same remedy which the Court applied without benefit of any express statutory or other authority. Surely if a court *must*, without benefit of any statute, grant reinstatement in such a case, an arbitrator, who has the power, by agreement, to interpret and apply the contract, *has the authority* to find that reinstatement, even after the contract term, is the indicated remedy for a violation of the contract during its term.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgments of the Courts of Appeals for the Fourth, Fifth and Sixth Circuits in these cases should be reversed.

Respectfully submitted

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In the Supreme Court of the United States

OCTOBER TERM, 1959.

No. 360.

UNITED STEELWORKERS OF AMERICA,

Petitioner,

versus

AMERICAN MANUFACTURING COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

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In the Supreme Court of the United States

OCTOBER TERM, 1959.

No. 360.

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AMERICAN MANUFACTURING COMPANY,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

PRELIMINARY STATEMENT.

In this Brief Respondent will limit itself exclusively to Case No. 360. Petitioner's Brief undertakes to treat this in consolidation with Numbers 443 and 538. Although for the most part, the questions in those cases appear to be entirely different from those presented in Number 360, Respondent is not sufficiently familiar with the record and issues in the other cases to undertake any discussion of them in this Brief. For brevity and clarity the Petitioner will at times be referred to as "the Union," and this Respondent as "the Company," or as "Management."

OPINIONS BELOW.

Although in the American Manufacturing Company case the opinion of the District Court for the Eastern District of Tennessee is unreported, the full text of that opinion appears in the record here before this Court. (Am. R. 39).[1] The opinion of the Court of Appeals for the Sixth Circuit has also been included in the Transcript of the Record. (Am. R. 64.)

QUESTIONS PRESENTED FOR REVIEW.

1. When a party brings an action in the District Court under Section 301(a) of the Labor-Management Relations Act to compel arbitration, is the Court merely a robot to pass with mechanical, thoughtless uniformity all alleged grievances to arbitrators for decision; or did Congress intrust to the Court, rather than to arbitrators, the decision as to arbitrability, where the parties did not agree in the contract that the decision as to arbitrability would be left to the arbitrators?

2. In determining the question of arbitrability, is the Court required to abandon all basic judicial concepts, and to use its extraordinary injunctive powers to compel arbitration of alleged grievances which are patently frivolous or baseless?

3. After a party has set in motion the Summary Judgment procedure authorized by the Federal Rules of Civil Procedure, and has so called on the Court to determine the issues pursuant to that part of the Rules, will that party be permitted to renounce and cast aside all the essential requirements of the Federal Rules so invoked, on the

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[1] References to the record in No. 360 will follow the same indication system adopted by the Petitioner. "Am. R." will refer to the record in Cause No. 360 and will be followed by the page number in the record printed by the Clerk of this Court.

theory that they do not apply to an action brought under Section 301(a) of the Labor-Management Relations Act?

4. In an action before the Court under said Section 301(a) seeking to compel arbitration of an alleged grievance as to re-employment; where a complainant and defendant in turn move for summary judgment; and it is shown that the contracting parties had agreed that re-employment seniority rights would be controlled by fitness, that is by the ability and efficiency of the former employee; where the entire record showed that the party seeking such re-employment was not able to lift the weights and do the stooping and bending required in such work; that the Respondent was a small manufacturing company not having any jobs which disabled men could fill; and that the party seeking re-employment was some twenty-five (25%) percent less able and efficient than the able-bodied men required in the employer's work; and further that the former employee had claimed, received and accepted Workmen's Compensation benefits in a Court action based upon twenty-five (25%) percent permanent disability, obtaining this disability award just seven days before he sought to return to his regular job; did the Court properly hold that the Union could not compel arbitration and that this alleged grievance was baseless?

5. Can a Union, acting for a Company's former employee, contend through a proceeding to compel arbitration that his ability and efficiency are equal to that of other employees as contemplated by the Seniority provisions of the Agreement, when he has very recently contended in Court that he is permanently disabled to the extent of twenty-five (25%) percent of his whole body, and the Company, relying on that contention, has settled on him a substantial sum of money, which he sought and accepted to recompense him for that permanent disability?

SUPPLEMENTAL STATEMENT OF THE CASE.

The Workmen's Compensation award demanded by Sparks, under the provisions of the Tennessee law, approved by the Court, and paid to Sparks, was in the lump sum amount of Three Thousand, Six Dollars, Twenty-four Cents ($3,006.24). (Am. R. 31.) This was in addition to substantial medical and hospital benefits. Although the Court order entered September 9, 1957 (Am. R. 31), did not specify the percentage of disability, it can be verified by mathematical computation from the provisions of the Tennessee Workmen's Compensation Act, that this award was made and approved on the basis of a twenty-five (25%) permanent disability. (Tennessee Code Annotated, 50-901, et seq.) That this compensation award was in payment for a claimed "twenty-five (25%) percent permanent-partial disability" is further verified by the record in the Summary Judgment proceeding in the District Court where W. Neil Thomas, Jr., Esq. in his affidavit, showed that the amount paid was based on the representation made by James D. Sparks and his physician that Sparks had a twenty-five (25%) percent permanent-partial disability. (Am. R. 54.)

The Record discloses a sequence of events as follows:

August 14, 1957—Dr. Warren Kimsey reports Sparks' permanent disability will remain at about twenty-five percent. (Am. R. 54.)

August 14, 1957—Dr. Warren Kimsey advises defendant's Plant Manager—James Sparks "cannot lift over thirty pounds of weight." (Am. R. 44.)

August 28, 1957—Dr. George W. Shelton finds James Sparks' permanent disability "to be twenty-five percent of the body as a whole for his particular type of work." (Am. R. 48.)

September 9, 1957—Sparks in court proceeding against employer obtains lump sum settlement based on twenty-five percent permanent disability of the body as a whole. (Am. R. 31 and Am. R. 54.)

September 16, 1957—Dr. Warren Kimsey signs statement To Whom it May Concern that James Sparks is now able to return to his former duties without danger to himself or to others. (Am. R. 39.)

September 16, 1957—(a Monday) Sparks seeks to return to work at his regular job, but was released or discharged. (Am. R. 20.)

September 23, 1957—Union files grievance report alleging violation of Seniority provisions of Agreement. (Am. R. 20.)

October 30, 1957—Attorneys for Company in the Workmen's Compensation Case request of James Sparks and his attorney a conference "to ascertain whether or not the premise upon which our settlement was based was well founded." (Am. R. 56, 57.) To which request no answer was received. (Am. R. 54.)

November 14, 1957—Dr. George W. Shelton (examining by consent of both parties) finds no change in twenty-five percent permanent disability of the body as a whole, and states "it is my opinion that he should not be placed on work requiring heavy lifting, or prolonged stooping or bending." (Am. R. 47, 48.)

December 19, 1957—Complainant filed in U. S. District Court seeking to compel arbitration of Sparks' insistence that he be returned to his regular job. (Am. R. 2.)

February 18, 1958—Motion for summary judgment filed by Union. (Am. 32.)

February 25, 1958—Affidavit of R. W. Goddard "Staff Representative" of Union filed in support of motion for summary judgment. (Am. R. 33.)

March 31, 1958—Supplemental affidavit of Mr. Goddard filed exhibiting copy of one sentence report of Dr. Kimsey dated September 16, 1957; no claim or insistence being made as to any error in earlier medical findings, or as to any subsequent recovery from twenty-five percent permanent disability of the body. (Am. R. 38-39.)

April 7, 1958—The Company requests summary judgment in its behalf. (Am. R. 56.)

Article II of the Collective Bargaining Agreement provided in part as follows:

> "The management of the works, the direction of the working force, plant layout and routine of work, including the right to hire, suspend, transfer, discharge or otherwise discipline any employee for cause, such cause being: infraction of Company rules, inefficiency, insubordination, contagious disease harmful to others, and any other ground or reason that would tend to reduce or impair the efficiency of plant operation * * * is reserved to the Company." (Am. R. 6.)

That same Article II further provides:

> "If any discharged or disciplined employee contends that he was not guilty of the cause given, he may question his discharge or disciplining by filing written protest within three (3) working days from the date of his discharge or discipline. Unless such written protest is filed, all questions of the discharge or disciplining will be considered waived." (Am. R. 6.)

No such protest was filed as required by this Article. Instead, the Union chose to approach the matter indirectly by demanding that he be re-employed at his regular job under Article XIV. (Am. R. 20, Am. R. 11.)

The Company's business is a small one, and the "regular job" to which the Union sought to have Sparks

re-employed demands that lifting and twisting and heavy work described by the Plant Manager, Mr. W. G. Alexander (Am. R. 43-46), and also described in part by James D. Sparks in his Amended Petition for Workmen's Compensation benefits. (Am. R. 28.)

The personal physician attending James D. Sparks, had notified the Company's Manager, Mr. Alexander, on August 14, 1957, that Sparks "cannot lift over thirty pounds of weight" (Am. R. 44), and Dr. George W. Shelton, examining by agreement of both parties, on November, 1957, expressed the opinion that Sparks should not be placed on work requiring heavy lifting or prolonged stooping or bending. (Am. R. 45.) The Company does not have any light jobs and could not provide James D. Sparks with any work where he would not be required to bend and stoop and lift and to handle weights totaling more than thirty pounds. (Am. R. 46.)

It was important, both to the Company and to its employees, that men working in this department among vats and tanks containing acid and chemicals must be able-bodied and efficient. (Am. R. 45-46.) Also see photographs reproduced. (Am. R. 49-52.)

Both the District Court and the Court of Appeals concurred in finding that the alleged grievance here presented by the Union was not an arbitrable one as a matter of law, and that the defendant Company's motion for a summary judgment should be granted (Am. R. 42) and the action dismissed. (Am. R. 67, 70.)

ARGUMENT.

I.

THE SUMMARY PROCEDURE PROVIDED BY THE FEDERAL RULES OF CIVIL PROCEDURE IS APPLICABLE TO ACTIONS BROUGHT UNDER SECTION 301(a) OF THE LABOR-MANAGEMENT RELATIONS ACT.

The Federal Rules of Civil Procedure, and specifically Rule 56, provide for Summary Judgment.

In the discussion following Rule 56, found in *Moore's Federal Rules and Official Forms* (1956 Edition), page 284, it is said:

> "It cannot be stressed too strongly that there is no civil action or issue that is immune to summary adjudication; and, when general principles have warranted, summary judgment has been rendered in all types of civil action and on all kinds of issues." *Moore's Federal Rules and Official Forms* (1956 Edition), page 284.

That the Summary Judgment procedure is properly usable in labor relations cases is amply recognized in the decisions of our Courts.

In *Elgin, J. and E. Railway Company v. Burley*, 325 U. S. 711, there was before this Court a question concerning the authority of a collective bargaining representative, affecting the operation of the Railway Labor Act. The District Court rendered summary judgment for the carrier. As to the District Court's judgment, Mr. Justice Rutledge, in the opinion, said that it "must be taken to have held that, upon the pleadings and the affidavits, no genuine issue of material fact was presented." The Court then specifically cited the Federal Rules of Civil Procedure, Rule 56(c), 28 U. S. C. A. following Section 723(c). *Elgin, J. and E. Ry. Co. v. Burley*, 325 U. S. 711, 719.

One of the cases cited with approval by the Court in *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448 at page 451, is a decision rendered by Judge Wyzanski on a motion for summary judgment. From the opinion in that earlier case it appears that "each party moved for summary judgment." *Textile Workers Union v. American Thread Co.*, 113 Fed. Supp. 137, 139.

When either or both parties ask for a summary judgment, ample opportunity is provided under the Rule for filing of affidavits and evidence of material facts.

II.

THE CONCEPTS OF JUSTICE AND THE MAXIMS DEVELOPED BY OUR COURTS THROUGH THE YEARS, ARE VALID GUIDES IN FEDERAL LABOR LAW.

Our Courts have been called on to fashion a body of substantive law to be applied in suits under Section 301(a). We humbly suggest that in fashioning such a body of applicable Federal Law, the Courts may well include as foundation principles, those maxims long found to be basic in American and English law.

This is a field of equity jurisprudence—of interpretation of right and wrong between groups of human beings—one group composing "Labor," the other making up "Management." It seems fitting that the venerable maxims so long accepted and followed in undertaking to fairly determine differences between man and man, should not now be discarded merely because the differences arise between two groups of individuals. We shall not undertake to include all applicable maxims. A few, we believe, will be illustrative:

A. "He who comes into equity must come with clean hands."

This statement is so well known that no citation is needed. However, it is quoted and to some extent expounded in *Gibson's Suits in Chancery* (Fifth Edition 1955), Section 51, page 63.

The Union member for whose benefit this action was originally filed, James Sparks, was on October 30, 1957, requested in writing by Attorneys Folts, Bishop & Thomas, to explain his reversal of position as to disability. In that letter and by copy to his attorney, a conference was requested in order that any explanation might be made. (Am. R. 55, 56.) "No answer or acknowledgment was received either from James D. Sparks or from his attorney." (Am. R. 54.)

Likewise, the petitioner Union had the full opportunity in the Summary Judgment proceedings to file an affidavit of Sparks himself, and to bring in medical reports to explain how James D. Sparks in so short a time could have recovered from that twenty-five (25%) percent permanent disability which he previously had claimed and which the doctors had found. By its silence and its refusal and failure to explain or modify, the petitioner in effect, admitted the truth of the facts presented by the respondent Company pursuant to the provisions of the Summary Judgment Rule of Federal Civil Procedure. Only a prima facie showing by or for James D. Sparks was necessary. If James D. Sparks was not still twenty-five (25%) percent permanently disabled, surely he could have brought in competent evidence.

When the person earlier claiming to be and found to be permanently disabled chooses not to attempt any explanation, a later claim made by or in his behalf that his ability and efficiency has now become equal to those of

the able-bodied laborers in the department where he formerly worked, is properly found to have no basis in fact before the Court. The undisputed record shows that anyone working in that department would have to be able-bodied, doing work requiring bending, stooping and lifting under the circumstances and in the surroundings shown by the photographic exhibits. (Am. R. 49-52.) Such a claim, unsupported by any evidence of probative value is patently frivolous and baseless. Time and energies of parties and of arbitrators should not be dissipated on such matters, where in the preliminary hearing (Summary Judgment here first demanded by the Union), no evidence of probative value to support the alleged grievance was produced by the complaining party. (Am. R. 70.)

B. "He is not to be heard who alleges things contradictory to each other."

This is an elementary rule of logic.

Also, it is one of the maxims found in *Broom's Legal Maxims* (Eighth American Edition 1882) at page 168.

On September 9, 1957, James D. Sparks claimed to be twenty-five (25%) percent permanently disabled and collected more than Three Thousand ($3,000.00) Dollars on that basis. (Am. R. 31, Am. R. 54.) Two weeks later (Am. R. 20), through the Union, he sought to be re-employed, claiming no longer to be disabled, but now claiming that he was fully able to do the very work that he and his doctor had claimed he could never do.

However, all the medical proof submitted in the Summary Judgment proceedings refuted the Sparks claim. It is true that Dr. Kimsey, one week after the disability hearing, said Sparks was able to return to his former duties. (Am. R. 39.) However, it is significant that this statement, dated September 16, 1957, was filed by the

Union representative on March 31, 1958 (Am. R. 38), after the Petitioner had full knowledge of the Company's answer, filed January 23, 1958 (Am. R. 20), in which Dr. Kimsey's adverse report of August 14, 1957, was quoted in full. (Am. R. 22.) In that earlier report, Dr. Kimsey's closing sentence was, "I also believe that his partial permanent disability will remain at about 25 percent." (Am. R. 22.) The Petitioner chose not to undertake any clarification or explanation. No explanation or modification by Dr. Kimsey has been offered. Nowhere has James D. Sparks himself either averred or testified that he could do the work necessary in this "regular job" to which the Union sought to have him re-employed.

As Judge Miller said in the Court of Appeals opinion, this evidence is "so lacking in probative value" as to "compel the conclusion that the so-called claim or grievance is a frivolous, patently baseless one, not subject to arbitration." (Am. R. 70.)

C. "Equity enforces what good reason and good conscience requires."

As to this maxim the writers of one treatise on the jurisprudence of equity have said:

> "Conscience itself might make too refined or too unstable a standard for the determination of human conduct in the Courts; and reason of itself might give too wide a range for sharp practices in matters of trade, or other dealings. Indeed, conscience without reason might degenerate into fanaticism, or gross eccentricity; and, on the other hand, reason without conscience might become trickery, or even downright knavery. Hence, in the administration of justice, conscience must be conformed to reason and thus become good conscience, and reason must be conformed to

conscience and thus become good reason; and whatever good conscience and good reason unite in approving is the nearest approach to perfect justice man is able to attain."—*Gibson's Suits in Chancery* (Fifth Edition) Vol. 1, Section 67, page 79, and to the same effect see *Lube's Equity Pleading* 17, 286 and *Pomeroy's Equity Jurisprudence*, Sections 55-57.

III.

THE DETERMINATION OF ARBITRABILITY IS FOR THE COURTS UNLESS THE AGREEMENT OTHERWISE PROVIDES.

Labor and management are two very important segments of our national life. Each has developed and grown in stature and in understanding in recent years. Their agreements, for the most part, are prepared by trained legal counsel. When an alleged grievance is claimed, its arbitrability should be determined by Judges trained in the law and not by laymen. Section 301 strongly implies the Congressional belief in judicial competence. It is the Courts who are called upon in the *Lincoln Mills* case to fashion the body of Federal Law to be applied in suits under Section 301 (a). Surely it was not the intent or purpose of the Labor-Management Act to withdraw from our Courts all judicial responsibility. Surely it was not meant that a petitioner by merely using the word "grievance" could automatically set in motion arbitration proceedings regardless of the reality of the alleged grievance. It is not conceivable that Congress purposed in the Labor-Management Act, to make of our Court system a mere dumb waiter to convey an alleged grievance, regardless of its evident baseless nature, to an arbitrator. At this time the lawyers and Courts of this land are engaged in an unusual effort to explain to the public of our country, and to the world, the important role of law in national and in inter-

national problems. To make of a Court a mere robot to mechanically transfer to arbitrators for determination, all alleged grievances, would be to emasculate the time honored functions of a Court to determine whether a justiciable issue has actually been presented.

The Labor-Management Act did not say that suits for violation of contracts between employee and employer should by-pass the Courts, or be acted on by administrative agencies, or that the issues should be determined solely by arbitrators. No—these matters must be brought in the District Court! Why? In order that the Court might exercise its valid functions! There is no need for such suits to be filed in the District Court, if every alleged grievance, no matter how unfounded and baseless it clearly appears to be, must be mechanically channeled by the Court to an arbitrator.

There is an old saying that calling an onion a rose does not make it one. And to this might be added, that it does not require the services of an arbitrator to tell the difference.

At some seven places in its Brief, the Petitioner has quoted from Professor Archibald Cox's article "Reflections on Labor Arbitration" found in 72 *Harvard Law Review* (1959), pages 1482 through 1518. It is therefore impressive, that at page 1509 of this *Law Review* article, Professor Cox says:

> "Nevertheless, I am persuaded that the conventional arbitration clause is not an agreement which allows an arbitrator to interpret its meaning, thereby determining his own jurisdiction."—Cox "Reflections on Labor Arbitration," 72 *Harv. L. Rev.* 1482-1509.

In the preceding paragraph it is clear that "the conventional arbitration clause" to which he refers is of the same type as is now before this Court in this case.

Judge Magruder, Chief Judge of the First Circuit, has, in several opinions, expressed the sound reasoning by which he arrived at the opinion that,

> "Arbitrability is a question which the District Court must pass on in the first instance."—*Local 205, etc. v. General Electric Co.*, 233 F. 2d 85, 101.

In his opinion in the later decision in 1957, subsequent to the *Lincoln Mills* case, the legal reasoning is set forth, the First Circuit again held that the Court must determine as a matter of law whether an alleged grievance is arbitrable. In that opinion the Court said:

> "However, that may be, and focusing our attention exclusively on the language of Section 301 (a), it is obvious that the plaintiff, in a suit under Section 301 (a) has the burden of establishing that it is bringing a suit for appropriate relief, legal or equitable, for violation of a term of a collective bargaining agreement; and that therefore the District Court, before undertaking to decree specific performance of a contract for arbitration, must necessarily first determine, as a matter of law, whether the alleged refusal to arbitrate is a violation of any term in the collective bargaining agreement."—*Local No. 149, etc. v. General Electric Co.*, 250 F. 2d 922, 929, 930.

In the later decision in the First Circuit in the case of *New Bedford Defense Products Division v. Local 1113 U. A. W.*, 258 F. 2d 522, 526, that Court again held that the District Court must determine as a preliminary matter the question of arbitrability.

Two quotations from an opinion of the Second Circuit also subsequent to the *Lincoln Mills* opinion will, we believe, be of aid to the Court here. In that opinion, Judge Waterman said:

> "To make out a case for arbitration, Sperry's alleged breach must be 'put in issue by facts, as dis-

tinguished from unsupported charges.' "—*Engineers Association v. Sperry Gyroscope Co., etc.*, 251 F. 2d 133, 137.

And then Judge Waterman goes on to show so clearly that a petitioner presenting an alleged grievance has only the requirement to make out a *prima facie* case. In that opinion it is stated:

> "Determination of arbitrability only requires that the moving party produce evidence which tends to establish his claim."—*Engineers Association v. Sperry Gyroscope Co., etc.*, 251 F. 2d 133, 137.

IV.

ARBITRATION SHOULD BE DENIED WHERE THE ALLEGED CLAIM OR GRIEVANCE IS FRIVOLOUS OR PATENTLY BASELESS.

In a 1959 decision, Judge Murray of the Montana District Court held that "a frivolous or patently baseless claim should not be ordered to arbitration," but in the case immediately before him he held that the matter was not of that type and that arbitration should proceed.—*Butte Miners Union No. 1 v. Anaconda Company*, 159 F. Supp. 431 at page 436.

The judgment of the District Court in that case was affirmed for the reasons and upon the grounds set forth in the opinion of the District Court. *Anaconda Company v. Butte Miners Union*, 267 F. 2d 940.

In *New Bedford Defense Products Division v. Local No. 1113 U. A. W.*, 258 F. 2d 522 (1st Cir. 1958), Judge Magruder, in the course of the opinion, specifically refers to, and in effect incorporates the reasoning of the earlier decision of that same Circuit (*Local 205, etc. v. General Electric Company* (1st Cir. 1956) 233 F. 2d 85) in which he had written the earlier opinion. Referring to this earlier case that Court said in effect that the *New Bedford* deci-

sion was not intended to be contrary to the earlier decision (258 F. 2d at 526, 527). In that earlier case Judge Magruder specifically stated that even where the contract in suit puts the matter of arbitrability into the hands of the arbitrator, the Court can give an order requiring arbitration only if "the applicant's claim of arbitrability is not frivolous or patently baseless," 233 F. 2d at 101.

Again, we wish to quote from Professor Cox's long article in the *Harvard Law Review*, Volume 72. At the close of the third from the last paragraph of that article Professor Cox seems to summarize a substantial part of his discussion in two short sentences:

> "* * * Arbitration should be ordered in an action under Section 301 whenever the claim might fairly be said to fall within the scope of the collective-bargaining agreement. If the latter contention be made but is patently frivolous, arbitration should be denied." Cox, "Reflections on Labor Arbitration," 72 *Harv. L. Rev.* 1482, 1516 (1959).

CONCLUSION.

The judgment of the Court of Appeals affirming that of the District Court should here be affirmed.

Respectfully submitted,

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PETITIONER'S REPLY

BRIEF

Nos. 360, 443 and 538

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 360

UNITED STEELWORKERS OF AMERICA, *Petitioner*,

v.

AMERICAN MANUFACTURING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 443

UNITED STEELWORKERS OF AMERICA, *Petitioner*,

v.

WARRIOR & GULF NAVIGATION COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 538

UNITED STEELWORKERS OF AMERICA, *Petitioner*,

v.

ENTERPRISE WHEEL & CAR CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

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v.

ENTERPRISE WHEEL & CAR CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

I. THE QUESTION IN *AMERICAN MANUFACTURING* AND *WARRIOR & GULF* IS NOT *WHETHER* THE COURT SHOULD DETERMINE IF THERE HAS BEEN A BREACH OF A PROMISE TO ARBITRATE, BUT *HOW* THE COURT SHOULD MAKE THAT DETERMINATION.

In the *Warrior & Gulf* and *American Manufacturing* cases, the companies have devoted a substantial part of their respective briefs to the proposition that a federal court, before ordering arbitration, must determine whether there has been a breach of a promise to arbitrate. Both companies have apparently misconstrued our argument, as set forth in our orig-

inal brief. We do not argue that the federal courts should be "a mere conduit for automatic and mandatory submission of all questions to arbitration" (W.&G. Br., p. 14) or that the court should be "a mere robot to mechanically transfer to arbitrators for determination, all alleged grievances" (Am. Mfg. Br., p. 14). Indeed, we do not even argue, as some authorities have,[1] that a clause requiring arbitration of all disputes involving the interpretation and application of the agreement should be read to include disputes over the interpretation and application of the arbitration clause, itself. Rather, we have accepted the premise, which the majority of lower federal courts have adopted, that the court, and not the arbitrator, must make the determination of whether a particular dispute is "arbitrable" before issuing an order compelling arbitration.

The basic issue in these cases, then, is not whether the court should make that determination, but how it should make it. On this critical issue, the briefs of the companies shed very little light. We are told by the Warrior & Gulf brief that the court should give "due regard to all pertinent factors" (p. 17), and we are told by the American Manufacturing brief that the court should "exercise its valid functions" (p. 14). Both companies devote most of their briefs to arguments which concern exclusively the merits of the particular grievances involved in the respective cases, but neither one tells us why the merits of the grievances are "pertinent" to the question of arbitrability, or why it is a "valid function" of the court to evaluate a grievance when the parties have entrusted that function to an arbitrator.

No purpose would be served by repeating here the reasons set out in our original brief why the federal courts, in deter-

[1] See *Food Handlers Local 425 v. Pluss Poultry, Inc.*, 260 F. 2d 835, 838 (8th Cir. 1958); *Insurance Agents Int'l Union v. Prudential Ins. Co.*, 122 F. Supp. 861 (E. D. Pa., 1954); Gregory, *The Law of the Collective Agreement*, 37 Mich. L. Rev. 635, 648 (1939); Rosenfarb, *The Courts and Arbitration*, N.Y.U. 6th Ann. Conf. on Lab. Law 161, 170-71 (1953); Note, 59 Colum. L. Rev. 153, 172-73 (1959).

mining the arbitrability of a grievance, should avoid passing judgment on the merits of that grievance. We would like, however, to direct this Court's attention to the fact that the National Academy of Arbitrators, the professional association of the labor arbitrators of this country, has officially reported "the firmly held convictions" of its members that "the integrity of free collective bargaining" requires that the agreement to settle by arbitration disputes concerning the rules governing the industrial community be enforced by preventing either party from turning to a different forum than the one agreed upon. In accordance with that view, the Academy has urged the adoption of a federal statute intended to give to the arbitrator the initial jurisdiction to determine arbitrability, and to provide only the most limited review of arbitration awards. We have filed with the Clerk copies of the Academy's proposed statute, as well as its introductory statement. While the proposed statute itself is, of course, immaterial to this case, the views on which the proposal is based as to what the role of the courts in the arbitration process should be, particularly since they are the views of those who are most intimately familiar with the arbitration process, are relevant to the determination of the central issue in these cases.

II. THE COMPANY'S COUNTER STATEMENT OF FACTS IN *WARRIOR & GULF* IS MISLEADING.

In order to keep the record straight, it may be desirable for us briefly to comment on some of the statements made in the Warrior & Gulf Company's counter-statement of facts, even though these statements bear only on the merits of the grievance, and not on the question of whether the grievance is arbitrable. On the top of page 4 of its brief, the company has set out a table showing the amount of contracting out done over the years. In examining this table, it should be borne in mind that the union's grievance did not protest contracting out as such—it protested the contracting out of work which bargaining unit employees could do and had done in

the past. The union repeatedly made this clear in the trial of the case (War. R. 50, 69, 96). Thus, what is important in this controversy is not the total amount of work which the company contracted out, but the proportion of that work which could have been done by its own employees. For example, while the company contracted out $234,000 worth of work in 1954, this included approximately $225,000 for a major non-recurring item, new bottoms, which is not the sort of work which the union claims and which could not be done at the company's terminal (War. R. 86-88).

The company's chart is also misleading in that the 1958 figure, $48,000, represents only nine months of that year (War. R. 86), while the other figures represent a full 12 months. If the 1958 figure were projected for the balance of that year, the amount would be approximately $64,000.

The company asserts that the record does not "bear out" the union's statement that the company had contracted out work which laid off employees could perform and had performed in the past. In fact, the union presented ample evidence to this effect (See War. R. 35-36, 41-42, 44, 48, 50, 56-57), and the company attorney himself stated, "We are not contending that some of the work which we are subcontracting out cannot be done in our yard" (War. R. 53). Indeed, the company's own witness, on direct examination, was asked by the company attorney, "Do you deny that some of the work which is done by companies to which you subcontract is similar or the same as work which is done in your yard?" The answer: "They do work that we are capable of doing. There is no question about it" (War. R. 70).

Finally, the company states that it was the union which first introduced testimony going to the merits of the grievance. This is, of course, true, since the union, as the plaintiff, was obliged to present its case first. But this testimony was introduced only after the court had denied the union's motion to strike from the company's pleadings those allega-

tions which put the merits of the grievance in issue (War. R. 33). Union counsel expressly stated that he was introducing evidence on the merits of the grievance solely because the court, by denying the motion to strike, had permitted the merits of the grievance to remain in issue (War. R. 37-38).

III. NEITHER THE ROLE OF THE COURT UNDER THE STATUTORY GRIEVANCE ADJUSTMENT SYSTEM PROVIDED IN THE RAILWAY LABOR ACT, NOR THE STATUTORY DUTY TO BARGAIN UNDER THE NATIONAL LABOR RELATIONS ACT, IS RELEVANT TO THE ISSUES IN THESE CASES.

On page 11 of its brief, the Warrior & Gulf Company suggests that the role of the court in grievance arbitration should be similar to the role of the court in the grievance adjustment process created by Section 3 of the Railway Labor Act, 45 U.S.C. § 153. As the very case which the company cites makes clear, however, the Railway Labor Act provides a statutory system for adjusting grievances which is quite different from arbitration.

> "If it had been intended that the orders of the [Railroad Adjustment] Board rendered pursuant to 45 U.S.C.A. § 153 should have the effect of awards of arbitrators, some such provisions as are contained in 45 U.S.C.A. §§ 158 and 159 which relate to arbitration under 45 U.S.C.A. § 157, would have been provided for their enforcement. The fact that an entirely different provision was made for the enforcement of Board orders under Section 153 from that made for enforcement of arbitration awards entered under the existing statute relating to arbitration is a matter which cannot be ignored and which shows clearly that Congress did not intend Board orders to have the effect of arbitration awards." *Brotherhood of Ry. Clerks* v. *Atlantic Coast Line R.R.*, 253 F. 2d 753, 757-58 (4th Cir. 1958).

It is plain, therefore, that the Railway Labor Act has no bearing on the present case.

The company also argues that the contractual duty to arbitrate is somehow analogous to the duty to bargain under the National Labor Relations Act. It cites *Jacobs Mfg. Co.*, 94 N.L.R.B. 1214 (1951), *enf'd* 196 F. 2d 680 (2d Cir. 1952) for the proposition that there is no duty to bargain "on subjects of demands made and rejected, as here, in the negotiation of the contract," and thus concludes that it has no duty to arbitrate any grievance involving contracting out of bargaining unit work (p. 12).

This is utterly spurious reasoning. If the *Jacobs* case can be read to hold what the company says it holds, which is in itself dubious, then the case would support the union's position here, not the company's.

The basic issue in *Jacobs* was whether the existence of a collective bargaining agreement precludes any duty to bargain during its term concerning matters which are not explicitly mentioned in it. The controlling provision of the statute was that portion of section 8(d), 29 U.S.C. § 158(d), which states that the duty to bargain does not require any party to discuss "any modification of the terms and conditions contained in a contract for a fixed period." In *Jacobs*, the company had refused, during negotiations under a wage reopener provision, to bargain concerning a pension plan and certain improvements in the insurance program. The insurance improvements had been rejected at the time the agreement had been originally negotiated; the subject of pensions had not previously been discussed.

Two members of the Board held that, in the interest of industrial peace and sound labor relations, the limitation in section 8(d) on the duty to bargain should be strictly construed, and that therefore both subjects, since they were not mentioned in the agreement, were bargainable. Chairman Herzog agreed as to pensions, but held that since the insur-

ance improvements had been discussed and rejected, the failure to include them in the agreement was part of the bargain and therefore should be considered settled for the term of the agreement. Member Reynolds held that the agreement should be construed as embodying all the rights and obligations of the parties for its term, and not subject to any further bargaining except as provided therein. Member Murdock reached the same result as Member Reynolds on the separate ground that the company's only obligation under the wage reopener was to discuss wages. Thus, only one member of the Board, Chairman Herzog held what the company in the present case cites it for—that a matter which had been discussed in negotiations was not subject to a duty to bargain during the term of the agreement—and the ground for this holding was that the agreement impliedly covered that matter.

Chairman Herzog's reasoning, of course, supports our argument here that if the company had the right to contract out, it had that right by virtue of the agreement, and therefore that the question of whether that right exists, and whether it has any limitations, is a question of interpretation and application of the agreement. The position of Member Reynolds in *Jacobs,* that the agreement covers even matters which were not discussed at negotiations, similarly supports the union's position in the present case. As for the opinion of the two members of the Board who held that both issues were bargainable, it does not affect the present case at all. That opinion is not inconsistent with our view that a collective bargaining agreement, particularly when it contains an absolute no strike clause, embodies all the rules governing the employment relationship during its term. What these two Board members held was, simply, that the parties could add to those rules during the term of the agreement, and that the company had an obligation, under the statute, to discuss with the union such proposed additions.

IV. THE COMPANY'S BRIEF IN THE ENTERPRISE CASE IS BASED UPON A FUNDAMENTAL MISCONCEPTION OF THE ISSUES IN THAT CASE.

The Company's argument in the *Enterprise* case does not dispute the well-established proposition, which we set out in our principal brief, that an arbitrator's award is not reviewable on its merits at common law, and should not be reviewable under Section 301. Rather, the company's theory is that the court below properly modified the award in the present case because "the arbitrator exceeded the authority vested in him by the contract." (Ent. Br., p. 32).

The authority of the arbitrator in this case was to render "final and binding" decisions on disputes between the parties which involved "differences . . . as to the meaning and application of the provisions of this Agreement." (Ent.R. 1a-16, 17) Stripped down to its bare bones, the company's argument that the arbitrator exceeded this grant of authority goes something like this: the arbitrator had power only to interpret and apply the agreement; the agreement, properly interpreted, does not provide for reinstatement and back pay beyond the expiration date, even with respect to employees unjustly discharged during the term of the agreement; therefore, the arbitrator's award goes beyond the agreement and is, to that extent unenforceable.

If the company is wrong on the minor premise of this argument—that the agreement did not authorize the remedy which the arbitrator awarded—then, of course, the argument concededly falls. But the question of whether or not the agreement authorized that remedy is, after all, a question as to the meaning of the agreement, and was decided as such by the arbitrator. Thus, the question was one which the arbitrator had jurisdiction to decide and which he has decided, in a decision which the company has agreed shall be "final and binding."

The company's argument, if sustained, would mean that any party which is dissatisfied with an award could challenge that award as being in excess of the "jurisdiction" of the arbitrator because it is based on an incorrect reading of the contract, and therefore beyond the contract. *Cf. Bell* v. *Hood*, 327 U. S. 678 (1946). By this reasoning, the company would limit the jurisdiction of any arbitrator to the rendering of decisions with which a court agrees. We submit that it is the company, not the union, which is here engaging in "bootstrap" logic.

Significantly, the company, while contending that the agreement did not provide for reinstatement and back pay beyond the expiration date, concedes that an agreement *could* so provide. In the company's words,

> "The entire matter is subject to regulation between the parties by their contract. If a union allows a contract to be terminated or does not provide for a contract of longer duration or fails to provide for contingencies, it cannot complain that federal policy favoring arbitration is thwarted. *If additional or continuing rights are desired, the simple solution for the union is to provide in the contract for the disposition of grievances which are pending when the contract expires.*" (p. 19, emphasis added.)

This concession, in our view, fully disposes of this case. The union believed that the contract provided precisely what the company admits it could have provided: full reinstatement to employees unjustly discharged during the term of the agreement, regardless whether the agreement had meanwhile expired. The company disagreed, the matter was submitted to the arbitrator, and he, in the exercise of his authority to interpret the agreement, upheld the union. The company, under the agreement, is obligated to comply with the award, even though it disagrees with it. The court,

therefore, should enforce the award, irrespective of the company's arguments or the court's view as to the correctness of the arbitrator's decision.

The company is able to avoid the obvious circularity in its reasoning by mis-stating the problem. Consistently and repeatedly, the company argues that what was in issue before the arbitrator was "damages for wrongful discharge" (Ent. Br., p. 32). This theme recurs constantly (See, e.g., Ent. Br., pp. 33, 35, 36, 43, 45, 46, 47, 50). Since the employees here were working under a contract which expired on April 4, 1957, the measure of damages for their wrongful discharge, the company argues, is obviously the period for which the contract was written. This is not a question of interpretation and application of the agreement, the company says, but of contract and damage law on which the authorities are clear.

The difficulty with this whole argument, as the district court clearly and correctly held (Ent. R. 1a-9, 10), is that it misconceives the issue. The grievance before the arbitrator was not a request for damages because the company had breached its contract, but was a request that the employer comply with its contract. The law of damages is immaterial because no one has asked for damages. Like Moore, in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630 (1941), the grievants here had the right to challenge the validity of their discharge and seek reinstatement with back pay (although their right derived from the contract rather than the Railway Labor Act). Moore, rather than making such a challenge, "chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract." *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, 244 (1950). The grievants here did not, and any reasoning based on the assumption that their claim must be treated as if it were a claim for damages rests on a wholly erroneous premise.

The distinction between a claim for damages and the kind of grievance presented here is sharply illustrated if we assume that the discharges had taken place at the beginning of a five-year contract. A claim for damages—if one would lie—might be argued to be measured by the term of the agreement, we concede. The claimants might be entitled to only five years wages if they won. But, under the grievance and arbitration procedure of this agreement, and under most collective bargaining agreements, the grievants would be entitled, not to five years' wages, but to reinstatement, with back pay only up to the date of reinstatement.

The fact is that the arbitrator does not, under the usual collective agreement, award damages as such. His function is to interpret the agreement and to find what action by the employer is required, either expressly or impliedly, by that agreement. If he cannot find a remedy expressly or impliedly provided in the agreement, then he cannot award a remedy, even though a court in a similar situation would award damages. Conversely, if the arbitrator finds in the agreement a requirement that the company, when it has violated the agreement, must take certain steps to remedy the violation, he must then issue an award embodying that remedy, notwithstanding the fact that the remedy might go beyond what the law of damages might provide in a similar situation.

Let us suppose, for example, that an employer violates certain safety requirements set forth in a collective bargaining agreement, and as a result an employee is injured. Could an arbitrator award damages to the injured employee, in the amount of his medical and hospital bills, his lost earnings and or earning power, his pain and suffering, etc.? An employer in this situation would undoubtedly urge, and we think correctly, that the arbitrator has the power only to interpret and apply the agreement, and not to interpret

and apply the law of damages. Thus, the arbitrator would interpret, and require the company to comply with, the safety provisions, and any other relevant provisions of the agreement, but the question of the employee's right to damages, if any, would not be a question within his jurisdiction. Similarly, the arbitrator in this case interpreted the agreement, and required the company to take action which, in the arbitrator's view, the agreement, not the law, required the company to take.

Once this distinction, so clearly indicated by the *Slocum* case, *supra,* is understood, both the company's entire argument and any possible difficulty in the case, disappear. The agreement provides that an employee unjustly discharged shall be reinstated. The grievants had that right when they were discharged. The employer's delay in complying with his obligation to reinstate them cannot erase that obligation. Having arisen during the contract term it continued until complied with. It was neither enlarged nor diminished by the expiration of the agreement. If the agreement had provided—as it did not—for damages rather than reinstatement with back pay, that obligation, too, would have vested at the time of the discharge and would not have been enlarged or diminished by subsequent events. The difference is that, in the case of a claim for damages the employee's right, from the beginning, would have been to receive damages measured by the termination date of the agreement. In the case of a grievance asking that the discharge be set aside, the employee's right, from the beginning, is that specified in the agreement: reinstatement with back pay.

The decision of the arbitrator in this case, therefore, was not only within his jurisdiction, it was plainly right, except perhaps as it provided for deductions from the absolute requirement in the contract for back pay. But, right or wrong,

the decision was one for the arbitrator to make and, once it was made, it was "final and binding" upon the parties.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 360.—October Term, 1959.

United Steelworkers of America, Petitioner, v. American Manufacturing Co.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June 20, 1960.]

Mr. Justice Douglas delivered the opinion of the Court.

This suit was brought by petitioner union in the District Court to compel arbitration of a "grievance" that petitioner, acting for one Sparks, a union member, had filed with the respondent, Sparks' employer. The employer defended on the ground (1) that Sparks is estopped from making his claim because he had a few days previously settled a workmen's compensation claim against the company on the basis that he was permanently partially disabled, (2) that Sparks is not physically able to do the work, and (3) that this type of dispute is not arbitrable under the collective bargaining agreement in question.

The agreement provided that during its term there would be "no strike," unless the employer refused to abide by a decision of the arbitrator. The agreement sets out a detailed grievance procedure with a provision for arbitration (regarded as the standard form) of all disputes between the parties "as to the meaning, interpretation and application of the provisions of this agreement."[1]

[1] The relevant arbitration provisions read as follows:

"Any disputes, misunderstandings, differences or grievances arising between the parties as to the meaning, interpretation and application

The agreement also reserves to the management power to suspend or discharge any employee "for cause." [2] It also contains a provision that the employer will employ and promote employees on the principle of seniority "where ability and efficiency are equal." [3] Sparks left his work due to an injury and while off work brought an action for compensation benefits. The case was settled. Sparks' physician expressing the opinion that the injury had made him 25% permanently partially disabled. That was on September 9. Two weeks later the union

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of the provisions of this agreement, which are not adjusted as herein provided, may be submitted to the Board of Arbitration for decision. . . .

"The arbitrator may interpret this agreement and apply it to the particular case under consideration but shall, however, have no authority to add to, subtract from, or modify the terms of the agreement. Disputes relating to discharges or such matters as might involve a loss of pay for employees may carry an award of back pay in whole or in part as may be determined by the Board of Arbitration.

"The decision of the Board of Arbitration shall be final and conclusively binding upon both parties, and the parties agree to observe and abide by same. . . ."

[2] "The Management of the works, the direction of the working force, plant layout and routine of work, including the right to hire, suspend, transfer, discharge or otherwise discipline any employee for cause, such cause being: infraction of company rules, inefficiency, insubordination, contagious disease harmful to others, and any other ground or reason that would tend to reduce or impair the efficiency of plant operation; and to lay off employees because of lack of work, is reserved to the Company, provided it does not conflict with this agreement. . . ."

[3] This provision provides in relevant part:

"The Company and the Union fully recognize the principle of seniority as a factor in the selection of employees for promotion, transfer, lay-off, re-employment, and filling of vacancies, where ability and efficiency are equal. It is the policy of the Company to promote employees on that basis."

filed a grievance which charged that Sparks was entitled to return to his job by virtue of the seniority provision of the collective bargaining agreement. Respondent refused to arbitrate and this action was brought. The District Court held that Sparks, having accepted the settlement on the basis of permanent partial disability was estopped to claim any seniority or employment rights and granted the motion for summary judgment. The Court of Appeals affirmed, 264 F. 2d 624, for different reasons. After reviewing the evidence it held that the grievance is "a frivolous, patently baseless one, not subject to arbitration under the collective bargaining agreement." *Id.*, at 628. The case is here on a writ of certiorari, 361 U. S. 881.

Section 203 (d) of the Labor Management Relations Act, 1947, 61 Stat. 154, 29 U. S. C. § 173 (d) states, "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. . . ." That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play.

A state decision that held to the contrary announced a principle that could only have a crippling effect on grievance arbitration. The case was *International Assn. of Machinists* v. *Cutler-Hammer, Inc.*, 271 App. Div. 917, aff'd 297 N. Y. 519. It held that "If the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration." 271 App. Div., at 918. The lower courts in the instant case had a like preoccupattion with ordinary contract law. The collective agreement requires arbitration of claims that courts might be unwilling to entertain. Yet in the

context of the plant or industry the grievance may assume proportions of which judges are ignorant. Moreover, the agreement is to submit all grievances to arbitration, not merely those that a court may deem to be meritorious. There is no exception in the "no strike" clause and none therefore should be read into the grievance clause, since one is the *quid pro quo* for the other.[4] The question is not whether in the mind of a court there is equity in the claim. Arbitration is a stabilizing influence only as it serves as a vehicle for handling every and all disputes that arise under the agreement.

The collective agreement calls for the submission of grievances in the categories which it describes irrespective of whether a court may deem them to be meritorious. In our role of developing a meaningful body of law to govern the interpretatiton and enforcement of collective bargaining agreements, we think special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve. See *Lewis* v. *Benedict Coal Corp.*, 361 U. S. 459, 468. The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is then confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.

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[4] Cf. *Structural Steel & Ornament Assn.* v. *Shopmen's Local Union*, 172 F. Supp. 354, where the employer sued for breach of the "no strike" agreement.

The courts therefore have no business weighing the merits of the grievance,[5] considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those the court will deem meritorious. The processing of even frivolous claims may have therapeutic values which those who are not a part of the plant environment may be quite unaware.[6]

The union claimed in this case that the company had violated a specific provision of the contract. The company took the position that it had not violated that clause. There was, therefore, a dispute between the parties as to "the meaning, interpretation and application" of the collective bargaining agreement. Arbitration should have been ordered. When the judiciary undertakes to deter-

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[5] See *New Bedford Defense Products Division* v. *Local No. 1113*, 258 F. 2d 522, 526 (C. A. 1st Cir.).

[6] Cox, Current Problems in the Law of Grievance Arbitration, 30 Rocky Mt. L. Rev. 247, 261 (1958), writes:

"The typical arbitration clause is written in words which cover, without limitation, all disputes concerning the interpretation or application of a collective bargaining agreement. Its words do not restrict its scope to meritorious disputes or two-sided disputes, still less are they limited to disputes which a judge will consider two-sided. Frivolous cases are often taken, and are expected to be taken, to arbitration. What one man considers frivolous another may find meritorious, and it is common knowledge in industrial relations circles that grievance arbitration often serves as a safety valve for troublesome complaints. Under these circumstances it seems proper to read the typical arbitration clause as a promise to arbitrate every claim, meritorious or frivolous, which the complainant bases upon the contract. The objection that equity will not order a party to do a useless act is outweighed by the cathartic value of arbitrating even a frivolous grievance and by the dangers of excessive judicial intervention."

mine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal.

Reversed.

MR. JUSTICE FRANKFURTER concurs in the result.

MR. JUSTICE WHITTAKER, believing that the District Court lacked jurisdiction to determine the merits of the claim which the parties had validly agreed to submit to the exclusive jurisdiction of a Board of Arbitrators (*Textile Workers* v. *Lincoln Mills*, 353 U. S. 448), concurs in the result of this opinion.

MR. JUSTICE BLACK took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

Nos. 360, 443 AND 538.—OCTOBER TERM, 1959.

360	United Steelworkers of America, Petitioner, v. American Manufacturing Co.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.
443	United Steelworkers of America, Petitioner, v. Warrior and Gulf Navigation Company.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
538	United Steelworkers of America, Petitioner, v. Enterprise Wheel and Car Corp.	On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[June 20, 1960.]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE HARLAN joins, concurring.

While I join the Court's opinions in Nos. 443, 360 and 538, I add a word in Nos. 443 and 360.

In each of these two cases the issue concerns the enforcement of but one promise—the promise to arbitrate in the context of an agreement dealing with a particular subject matter, the industrial relations between employers and employees. Other promises contained in the collective bargaining agreements are beside the point unless, by the very terms of the arbitration promise, they are made relevant to its interpretation. And I emphasize this, for the arbitration promise is itself a contract. The parties are free to make that promise as broad or as narrow as they wish for there is no compulsion in law requiring them

to include any such promises in their agreement. The meaning of the arbitration promise is not to be found simply by reference to the dictionary definitions of the words the parties use, or by reference to the interpretation of commercial arbitration clauses. Words in a collective bargaining agreement, rightly viewed by the Court to be the charter instrument of a system of industrial self-government, like words in a statute, are to be understood only by reference to the background which gave rise to their inclusion. The Court therefore avoids the prescription of inflexible rules for the enforcement of arbitration promises. Guidance is given by identifying the various considerations which a court should take into account when construing a particular clause—considerations of the milieu in which the clause is negotiated and of the national labor policy. It is particularly underscored that the arbitral process in collective bargaining presupposes that the parties wanted the informed judgment of an arbitrator, precisely for the reason that judges cannot provide it. Therefore, a court asked to enforce a promise to arbitrate should ordinarily refrain from involving itself in the interpretation of the substantive provisions of the contract.

To be sure, since arbitration is a creature of contract, a court must always inquire, when a party seeks to invoke its aid to force a reluctant party to the arbitration table, whether the parties have agreed to arbitrate the particular dispute. In this sense, the question of whether a dispute is "arbitrable" is inescapably for the court.

On examining the arbitration clause, the court may conclude that it commits to arbitration any "dispute, difference, disagreement, or controversy of any nature or character." With that finding the court will have exhausted its function, except to order the reluctant party to arbitration. Similarly, although the arbitrator may

be empowered only to interpret and apply the contract the parties may have provided that any dispute as to whether a particular claim is within the arbitration clause is itself for the arbitrator. Again the court, without more, must send any dispute to the arbitrator, for the parties have agreed that the construction of the arbitration promise itself is for the arbitrator, and the reluctant party has breached his promise by refusing to submit the dispute to arbitration.

In *American*, the Court deals with a request to enforce the "standard" form of arbitration clause, one that provides for the arbitration of "any disputes, misunderstandings, differences or grievances arising between the parties as to the meaning, interpretation and application of this agreement. . . ." Since the arbitration clause itself is part of the agreement, it might be argued that a dispute as to the meaning of that clause is for the arbitrator. But the Court rejects this position, saying that the threshold question, the meaning of the arbitration clause itself, is for the judge unless the parties clearly state to the contrary. However, the Court finds that the meaning of that "standard" clause is simply that the parties have agreed to arbitrate any dispute which the moving party asserts to involve construction of the substantive provisions of the contract, because such a dispute necessarily does involve such a construction.

The issue in the *Warrior* case is essentially no different from that in *American*, that is, it is whether the company agreed to arbitrate a particular grievance. In contrast to *American*, however, the arbitration promise here excludes a particular area from arbitration—"matters which are strictly a function of management." Because the arbitration promise is different, the scope of the court's inquiry may be broader. Here, a court may be required to examine the substantive provisions of the contract to

ascertain whether the parties have provided that contracting out shall be a "function of management." If a court may delve into the merits to the extent of inquiring whether the parties have expressly agreed whether or not contracting out was a "function of management," why was it error for the lower court here to evaluate the evidence of bargaining history for the same purpose? Neat logical distinctions do not provide the answer. The Court rightly concludes that appropriate regard for the national labor policy and the special factors relevant to the labor arbitral process, admonish that judicial inquiry into the merits of this grievance should be limited to the search for an explicit provision which brings the grievance under the cover of the exclusion clause since "the exclusion clause is vague and arbitration clause quite broad." The hazard of going further into the merits is amply demonstrated by what the courts below did. On the basis of inconclusive evidence, those courts found that *Warrior* was in no way limited by any implied covenants of good faith and fair dealing from contracting out as it pleased—which would necessarily mean that *Warrior* was free completely to destroy the collective bargaining agreement by contracting out all the work.

The very ambiguity of the *Warrior* exclusion clause suggests that the parties were generally more concerned with having an arbitrator render decisions as to the meaning of the contract than they were in restricting the arbitrator's jurisdiction. The case might of course be otherwise were the arbitration clause very narrow, or the exclusion clause quite specific, for the inference might then be permissible that the parties had manifested a greater interest in confining the arbitrator; the presumption of arbitrability would then not have the same force and the Court would be somewhat freer to examine into the merits.

The Court makes reference to an arbitration clause being the *quid pro quo* for a no-strike clause. I do not understand the Court to mean that the application of the principles announced today depends upon the presence of a no-strike clause in the agreement.

MR. JUSTICE FRANKFURTER joins these observations.